

NO. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES  
OF AMERICA

ZAIRA FRANCO  
Petitioner-Defendant

v.

UNITED STATES OF AMERICA  
Respondent

On Petition for Writ of Certiorari from the  
United States Court of Appeals for the Fifth Circuit.  
Fifth Circuit Case No. 20-60473

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**PETITION FOR WRIT OF CERTIORARI**

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## **QUESTION PRESENTED FOR REVIEW**

Whether the district court erred by ruling that exhaustion of administrative remedies is required before a court can consider a motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i).

## **PARTIES TO THE PROCEEDING**

All parties to this proceeding are named in the caption of the case.

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## I. OPINIONS BELOW

The prosecution filed a Bill of Information (“Information”) against Ms. Franco alleging racketeering involving the sale of illegal drugs in violation of 18 U.S.C. § 1952(a)(3). It filed the Information in the United States District Court for the Southern District of Mississippi on March 8, 2017, under case number 3:17cr33-DPJ-LRA. She waived the right to a grand jury indictment, so none was sought or filed.

Ms. Franco accepted full responsibility for her actions by entering a guilty plea on March 14, 2017. Her sentencing hearing followed on January 23, 2018. The court sentenced Ms. Franco to serve 37 months in prison, followed by three years of supervised release. The court entered a Judgment reflecting this sentence on January 30, 2018.<sup>1</sup> Ms. Franco did not file a direct appeal of her conviction and sentence.

Ms. Franco filed the subject Motion for Reduction of Sentence on April 28, 2020. She filed the Motion *pro se*. On the same day – April 28, 2020 – the district court entered a General Order appointing the Office of the Federal Public Defender to represent Ms. Franco in relation to the subject Motion. After that, the prosecution filed a Response to the Motion and the undersigned filed a Reply

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<sup>1</sup> The district court’s Judgment is attached hereto as Appendix 1.

Supporting the Motion. The district court filed an Order denying the Motion for Reduction of Sentence on June 10, 2020.<sup>2</sup>

Ms. Franco appealed her case to the United States Court of Appeals for the Fifth Circuit on June 10, 2020. On June 18, 2020, she filed a Motion to Expedite Appeal in the Fifth Circuit. In the Motion, Ms. Franco argued that the appeal should be expedited to resolve an intra-district conflict regarding whether administrative remedies must be exhausted before a defendant can file a motion for compassionate release in district court. The Fifth Circuit granted the Motion to Expedite Appeal on June 19, 2020. Then on September 3, 2020, the Fifth Circuit entered an order affirming the district court's rulings. The court entered a Judgment on the same day.<sup>3</sup> The Fifth Circuit designated the Opinion for publication, but it does not appear in the Federal Reporter yet. It is in the Westlaw electronic database at 2020WL5249369.<sup>4</sup>

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<sup>2</sup> The district court's Order is attached hereto as Appendix 2.

<sup>3</sup> The Fifth Circuit's Opinion and Judgment are attached hereto as composite Appendix 3.

<sup>4</sup> The Westlaw rendition of the Opinion is attached hereto as Appendix 4.

## **II. JURISDICTIONAL STATEMENT**

The United States Court of Appeals for the Fifth Circuit filed both its Order and its Judgment in this case on September 3, 2020. This Petition for Writ of Certiorari is filed within 150 days after entry of the Fifth Circuit's Judgment as required by Rule 13.1 of the Supreme Court Rules, which was amended by this Court's COVID-19 related Order dated March 19, 2020. This Court has jurisdiction over the case under the provisions of 28 U.S.C. § 1254(1).

### III. STATUTE INVOLVED

The issue in this case is whether the district court erred by ruling that exhaustion of administrative remedies is required before a court can consider a motion for compassionate release. The administrative remedy provision at issue is in 18 U.S.C. § 3582(c)(1)(A), which states:

(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 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[.]

(Emphasis added).

## IV. STATEMENT OF THE CASE

### **A. Basis for federal jurisdiction in the court of first instance.**

This case involves a Motion for Compassionate Release because of dangers within the Bureau of Prisons (hereinafter “BOP”) associated with the COVID-19 pandemic. The underlying criminal conviction against Ms. Franco was for racketeering involving the sale of illegal drugs, in violation of 18 U.S.C. § 1952(a)(3). The court of first instance, which was the United States District Court for the Southern District of Mississippi, had jurisdiction over the case under 18 U.S.C. § 3231 because the criminal charge levied against Ms. Franco arose from the laws of the United States of America.

### **B. Statement of material facts.**

This appeal involves the district court’s denial of Ms. Franco’s Motion for Reduction of Sentence. She filed the Motion *pro se* but as described above, the Office of the Federal Public Defender assumed the responsibility of representing her in this case. The Motion is based on COVID-19 dangers within the BOP population and Ms. Franco’s vulnerability to the virus. Ms. Franco’s legal arguments rely on the provisions of 18 U.S.C. § 3582(c)(1)(A)(i).

Ms. Franco’s vulnerability to COVID-19 is increased because she suffers from hypertension. The Centers for Disease Control and Prevention (“CDC”) have issued guidance related to the deadly effects of COVID-19 on certain high-risk

patients of the population. The CDC updated their list of people who need to take extra precautions on July 17, 2020.<sup>5</sup> The updated report states in part:

Based on what we know at this time, people with the following conditions **might be at an increased risk** for severe illness from COVID-19:

Asthma (moderate-to-severe)

Cerebrovascular disease (affects blood vessels and blood supply to the brain)

Cystic fibrosis

*Hypertension or high blood pressure*

Immunocompromised state (weakened immune system) from blood or bone marrow transplant, immune deficiencies, HIV, use of corticosteroids, or use of other immune weakening medicines

Neurologic conditions, such as dementia

Liver disease

Pregnancy

Pulmonary fibrosis (having damaged or scarred lung tissues)

Smoking

Thalassemia (a type of blood disorder)

Type 1 diabetes mellitus<sup>6</sup>

(Bold emphasis in original; underlined and italicized emphasis added).

Consistent with the CDC's research, Ms. Franco's hypertension diagnosis places her at a potentially increased risk of illness because of the COVID-19 pandemic. However, as described above, the district court never ruled on the merits of her claim because it found that Ms. Franco failed to exhaust the purportedly "required" administrative remedies within BOP.

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<sup>5</sup> <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>

<sup>6</sup> *Id.*

## V. ARGUMENT

### **A. Introduction.**

Ms. Franco filed a COVID-19 related Motion for Reduction of Sentence in district court. She filed the Motion under the provisions of 18 U.S.C. § 3582(c)(1)(A)(i), which allows a court to reduce a sentence for “extraordinary and compelling reasons[.]”

Rather than consider the merits of Ms. Franco’s arguments, the district court denied the Motion without prejudice because she did not exhaust administrative remedies with BOP before filing the Motion. The court based dismissal of the Motion on a ruling that exhaustion of administrative remedies is required before a court can consider a motion under 18 U.S.C. § 3582(c)(1)(A)(i). Ms. Franco asks this Court to grant certiorari to examine whether exhausting the administrative remedies stated under § 3582(c)(1)(A) is required before a court can consider a motion under 18 U.S.C. § 3582(c)(1)(A)(i).

### **B. Review on certiorari should be granted in this case.**

In this case, Chief District Judge Daniel P. Jordan in the Southern District of Mississippi found that the 30-day exhaustion provision of 18 U.S.C. § 3582(c)(1)(A) is mandatory. As described above, Judge Jordan denied the Motion for Compassionate Release without prejudice because Ms. Franco did not exhaust administrative remedies.

The exhaustion provision of § 3582(c)(1)(A) states,

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 imprisonment....

In other words, under § 3582(c)(1)(A), a BOP inmate normally should not file a motion for compassionate release with the district court until the inmate files a request for administrative relief with BOP. Then the inmate typically should wait for the BOP's response or 30 days after the request is filed, whichever occurs first, before he or she files a motion for compassionate release in district court.

Judge Jordan found that the exhaustion provision of § 3582(c)(1)(A) is mandatory. Judge Carlton Reeves took a different position in *United States v. Kelly*, Case No. 3:13cr59-CWR-LRA, 2020 WL 2104241 (S.D. Miss. May 1, 2020), finding that the 30-day waiting period is not mandatory. Both Judge Jordan and Judge Reeves preside in the Southern District of Mississippi, Northern Division.

Rule 10 of the Supreme Court Rules states, “[a] petition for writ of certiorari will be granted only for compelling reasons.” With the continuing COVID-19 pandemic, this Court should exercise its supervisory power to establish the proper procedure for seeking compassionate release in district court. The following argument presents the specifics of this uncertain issue.

**C. The district court erred by ruling that exhaustion of administrative remedies is required before a court can consider a motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i).**

**1. The exhaustion provision is not jurisdictional.**

As an initial step in the compassionate release analysis, a court must determine if the exhaustion provision of § 3582(c)(1)(A) is jurisdictional or a claim processing rule. If it is jurisdictional, then a court lacks authority to consider the merits of an appeal if the exhaustion requirement is not met. If it is not jurisdictional, then a court may proceed on a merits ruling, even if the exhaustion requirement is not met.

The issue of jurisdiction appears to be uncontested in this case. Both Judge Jordan in this case and Judge Reeves in *Kelly* agree that the exhaustion provision is not jurisdictional. Additionally, the Sixth Circuit holds that the exhaustion provision is non-jurisdictional. *United States v. Alam*, 960 F.3d 831, 833 (6th Cir. 2020). This Court should also conclude that the subject exhaustion provision is a non-jurisdictional claim-processing rule.

**2. The exhaustion provision is not mandatory.**

We begin with Judge Reeves' well-reasoned analysis in *Kelly*. In *Kelly*, the prosecution relied on this Court's rulings in *Ross v. Blake*, 136 S.Ct. 1850 (2016) for its argument that the exhaustion provision is mandatory. *Kelly*, 2020 WL 2104241 at \*4. In *Ross*, "the Supreme Court held that a federal court could not

excuse the exhaustion requirements of the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a), under an unwritten ‘special circumstances’ exception.” *Id.* (citing *Ross*, 136 S. Ct. at 1855).

Addressing the prosecution’s argument, Judge Reeves considered the language of the PLRA. The relevant statute states: “No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” *Kelly*, 2020 WL 2104241 at \*4 (citing 42 U.S.C. § 1997e(a)). In the context of this statutory language, this Court held,

the statute contains one significant qualifier: the remedies must indeed be “available” to the prisoner. But aside from that exception, the PLRA’s text suggests no limits on an inmate’s obligation to exhaust—irrespective of any “special circumstances.” And that mandatory language means a court may not excuse a failure to exhaust, even to take such circumstances into account.

*Kelly*, 2020 WL 2104241 at \*4 (citing *Ross*, 136 S. Ct. at 1856).

Comparatively speaking, Judge Reeves recognized that “Section 3582(c)(1)(A) is not so strict.” *Kelly*, 2020 WL 2104241 at \*4. “It allows a prisoner to fully bypass the exhaustion requirement. A defendant must either fully exhaust the BOP’s usual administrative process or wait 30 days after the warden receives the defendant’s request to bring a motion for a sentence reduction.” *Id.* (emphasis in original).

Based on the second alternative – i.e., that a defendant can file a motion for sentence reduction without any determination by the warden if 30 days has passed – Judge Reeves ruled that the §3582(c)(1)(A) exhaustion provision is not mandatory. *Kelly*, 2020 WL 2104241 at \*4. In other words, since the statute allows an alternative for a defendant to proceed without any action from the warden at all, Congress did not intend for the exhaustion provision to be mandatory.

Judge Reeves’ decision in *Kelly* is consistent with the Southern District of New York’s rulings in *United States v. Haney*, No. 19-CR-541 (JSR), 2020 WL 1821988 (S.D. N.Y. Apr. 13, 2020). Like Ms. Franco’s case, *Haney* involved whether the §3582(c)(1)(A)’s exhaustion provision is mandatory. *Id.* at \*3.

*Haney* recognizes that “Congressional intent is ‘paramount’ to any determination of whether exhaustion is mandatory.” *Haney*, 2020 WL 1821988 at \*3 (citations omitted). The court held that “Congress cannot have intended the 30-day waiting period of § 3582(c)(1)(A) to rigidly apply in the highly unusual situation in which the nation finds itself today.” *Id.* The court is referring to the COVID-19 situation when it states “the highly unusual situation in which the nation finds itself today.” *See id.* at \*1.

Reaching its conclusion the *Haney* court recognized, as Judge Reeves did in *Kelly*, that

§ 3582(c)(1)(A) does not contain an exhaustion requirement in the traditional sense. That is, the statute does not necessarily require the moving defendant to fully litigate his claim before the agency (i.e., the BOP) before bringing his petition to court. Rather, it requires the defendant either to exhaust administrative remedies or simply to wait 30 days after serving his petition on the warden of his facility before filing a motion in court.

*Haney*, 2020 WL 1821988 at \*3 (emphasis in original). The fact that “the statute gives the defendant this choice is crucial to understanding Congress’s intent.” *Id.*

The *Haney* court goes on to analyze Congress’ purpose when it includes exhaustion provisions in statutes. Under Supreme Court precedent, exhaustion provisions “serve[] the twin purposes of protecting administrative agency authority and promoting judicial efficiency.” *Haney*, 2020 WL 1821988 at \*3 (citing *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992)). However, “the hybrid requirement in this statute – either exhaust or wait 30 days – substantially reduces the importance of the first purpose, as it allows a defendant to come to court before the agency has rendered a final decision.” *Id.* As the *Haney* court recognizes, “anyone familiar with the multiple demands that the BOP has faced for many years in this era of mass incarceration can reasonably infer that Congress recognized that there would be many cases where the BOP either could not act within 30 days on such a request[.]” *Id.* And “even if it did act, its review would be superficial.” *Id.*

By including the 30-day waiting period as an option under § 3582(c)(1)(A), Congress was determined “not to let … exigencies” like the COVID-19 pandemic “interfere with the right of a defendant to be heard in court on his motion for

compassionate release[.]” *Haney*, 2020 WL 1821988 at \*3. Based on this well-reasoned legal logic, “the reduction of the wait period to a mere 30 days also “unquestionably reflects” a third purpose, i.e., “*congressional intent for the defendant to have the right to a meaningful and prompt judicial determination of whether he should be released.*” *Id.* (underlined emphasis in original; italicized emphasis added) (citation omitted).

As to the first purpose of exhaustion provisions – protecting an administrative agency’s authority – the *Haney* court concluded that it “has the discretion to waive the exhaustion requirement where, as here, strict enforcement of the 30-day waiting period would not serve these Congressional objectives.” *Haney*, 2020 WL 1821988 at \*4. This conclusion is supported by the fact that “in the extraordinary circumstances now faced by prisoners as a result of the COVID-19 virus and its capacity to spread in swift and deadly fashion, the objective of meaningful and prompt judicial resolution is clearly best served by permitting Haney to seek relief before the 30-day period has elapsed.” *Id.* “[U]nder present circumstances, each day a defendant must wait before presenting what could otherwise be a meritorious petition threatens him with a greater risk of infection and worse.” *Id.*

Next, the *Haney* court considered the second purpose of exhaustion provisions – promoting judicial efficiency. *See McCarthy*, 503 U.S. at 145. The

exhaustion provision can promote judicial efficiency in many circumstances by either mooting an issue or developing facts for a court to review. *Haney*, 2020 WL 1821988 at \*4 (citation omitted). However, “in these exceptional times, § 3582(c)(1)(A)’s exhaustion provision is having the opposite effect.” *Id.* Because of the COVID-19 pandemic, inmates have inundated BOP with requests for compassionate release, and BOP simply cannot handle the volume of requests. *Id.* This has caused inmates to come to the court system in large numbers, regardless of the 30-day waiting rule. *Id.*

So the bottom line on judicial economy is this – “courts determined to enforce the waiting period are essentially forced to consider each such motion twice, first to conclude that the exhaustion provision is not satisfied, and then again, days or at most a few weeks later, to reach the merits once the requisite time has elapsed.” *Haney*, 2020 WL 1821988 at \*4. Further, “[c]ourts that have attempted in recent days to avoid this situation by ordering the BOP to decide the underlying petition quickly have been effectively rebuffed.” *Id.* (citing Affidavit, *United States v. Nkanga*, No. 18-cr-713 (JMF), ECF No. 117-1, ¶ 10, 2020 WL 1695417 (S.D. N.Y.) (“Due to the nature of the review and the volume of incoming requests, the BOP cannot set forth a firm date by which the BOP will reach a decision on Petitioner’s pending application.”); Letter from Assistant U.S. Attorney to Judge Liman, dated April 2, 2020, *United States v. Russo*, No. 17-cr-441 (LJL),

ECF No. 53 (S.D. N.Y.) (“[T]he Bureau of Prisons is unable to give a specific time frame ....”).

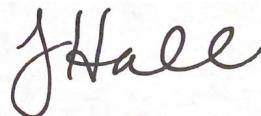
In conclusion, the *Haney* court held that “Congressional intent not only permits judicial waiver of the 30-day exhaustion period, but also, in the current extreme circumstances, actually favors such waiver, allowing courts to deal with the emergency before it is potentially too late.” *Haney*, 2020 WL 1821988 at \*4. The court therefore proceeded with deciding the merits of Haney’s claims, even though the 30-day waiting period did not pass. *Id.*

In summary, exhaustion provisions serve the twin purposes of protecting administrative agency authority and promoting judicial efficiency. *McCarthy*, 503 U.S. at 145. Based on the analyses presented above, making the subject exhaustion provision mandatory advances neither of these goals. Therefore, this Court should grant certiorari and rule that the exhaustion provision in § 3582(c)(1)(A) is a waivable claim processing rule.

## VI. CONCLUSION

Based on the arguments presented above, Mr. Franco asks the Court to grant his Petition for Writ of Certiorari in this case.

Submitted October 7, 2020 by:



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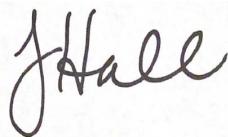
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**CERTIFICATE OF SERVICE**

I, Jacinta A. Hall, appointed under the Criminal Justice Act, certify that today, October 7, 2020, pursuant to Rule 29.5 of the Supreme Court Rules, a copy of the Petition for Writ of Certiorari and the Motion to Proceed In Forma Pauperis was served on Counsel for the United States by Federal Express, No. 7717 3442 4729, addressed to:

The Honorable Noel Francisco  
Solicitor General of the United States  
Room 5614, Department of Justice  
950 Pennsylvania Ave., N.W.  
Washington, D.C. 20530-0001

I further certify that all parties required to be served with this Petition and the Motion have been served.



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**Jacinta A. Hall**  
Assistant Federal Public Defender