



UNITED STATES DISTRICT COURT

Southern District of Mississippi

UNITED STATES OF AMERICA

v.

ZARIA FRANCO

)
) JUDGMENT IN A CRIMINAL CASE
)
) Case Number: 3:17cr33WHB-LRA-001
)
) USM Number: 14679-479
)
) John M. Colette
)
) Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) the single-count Bill of Information

pleaded nolo contendere to count(s) _____ which was accepted by the court.

was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. § 1952(a)(3)	Interstate Travel in Aid of a Racketeering Enterprise	09/22/2015	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____

Count(s) _____ is are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

January 23, 2018
Date of Imposition of Judgment


Signature of Judge

The Honorable William H. Barbour, Jr. Senior U.S. District Judge
Name and Title of Judge

Date

1/30/18

AO 245B(Rev. 10/17) Judgment in a Criminal Case

Sheet 2 — Imprisonment

Judgment — Page 2 of 7

DEFENDANT: ZARIA FRANCO
 CASE NUMBER: 3:17cr33WHB-LRA-001

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

37 months

The court makes the following recommendations to the Bureau of Prisons:

The Court recommends the defendant be designated to a facility closest to Houston, Texas.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____.
 as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 12:00 p.m. on March 1, 2018.

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

 UNITED STATES MARSHAL

By _____
 DEPUTY UNITED STATES MARSHAL

DEFENDANT: ZARIA FRANCO
CASE NUMBER: 3:17cr33WHB-LRA-001**SUPERVISED RELEASE**

Upon release from imprisonment, you will be on supervised release for a term of :

3 years

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

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Sheet 3A — Supervised Release

Judgment—Page 4 of 7

DEFENDANT: **ZARIA FRANCO**
 CASE NUMBER: **3:17cr33WHB-LRA-001**

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

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Sheet 3D — Supervised Release

Judgment—Page 5 of 7

DEFENDANT: ZARIA FRANCO

CASE NUMBER: 3:17cr33WHB-LRA-001

SPECIAL CONDITIONS OF SUPERVISION

- 1) You shall not incur new credit charges or open additional lines of credit without the approval of the supervising U.S. Probation Officer, until such time that your fine is paid fully.
- 2) You shall provide the probation office with any requested financial information.
- 3) You shall submit your person, property, house, residence, vehicle, papers, cellular phone, or office, to a search conducted by a United States Probation Officer. Failure to submit to a search may be grounds for revocation of release. You shall warn any other occupants that the premises may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that you have violated a condition of your supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

AO 245B(Rev. 10/17) Judgment in a Criminal Case

Sheet 5 — Criminal Monetary Penalties

Judgment — Page 6 of 7

DEFENDANT: ZARIA FRANCO

CASE NUMBER: 3:17cr33WHB-LRA-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

TOTALS	Assessment	JVTA Assessment*	Fine	Restitution
	\$ 100.00	\$	\$ 1,500.00	\$

The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage
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TOTALS	\$ <u>0.00</u>	\$ <u>0.00</u>
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Restitution amount ordered pursuant to plea agreement \$ _____

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

the interest requirement is waived for the fine restitution.

the interest requirement for the fine restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: ZARIA FRANCO
CASE NUMBER: 3:17cr33WHB-LRA-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A Lump sum payment of \$ 1,600.00 due immediately, balance due
 not later than _____, or
 in accordance with C, D, E, or F below; or

B Payment to begin immediately (may be combined with C, D, or F below); or

C Payment in equal _____ (*e.g., weekly, monthly, quarterly*) installments of \$ _____ over a period of _____ (*e.g., months or years*), to commence _____ (*e.g., 30 or 60 days*) after the date of this judgment; or

D Payment in equal monthly (*e.g., weekly, monthly, quarterly*) installments of \$ 50.00 over a period of xx xx (*e.g., months or years*), to commence 60 days (*e.g., 30 or 60 days*) after release from imprisonment to a term of supervision; or

E Payment during the term of supervised release will commence within _____ (*e.g., 30 or 60 days*) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:

In ordering this nominal monthly payment, the Court recognizes the full amount will likely not be paid in full prior to the termination of supervised release, and in that event, you are ordered to enter into a written agreement with the Financial Litigation Unit of the U.S. Attorney's Office for payment of the remaining balance. Additionally, the value of any future discovered assets may be applied to offset the balance of criminal monetary penalties. You may be included in the Treasury Offset Program allowing qualified federal benefits to be applied to offset the balance of criminal monetary penalties.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers (*including defendant number*), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

The defendant shall pay the cost of prosecution.

The defendant shall pay the following court cost(s):

The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

UNITED STATES OF AMERICA

V.

CRIMINAL NO. 3:17-CR-33-DPJ-LRA

ZARIA FRANCO

ORDER

Defendant Zaria Franco asks the Court to reduce her sentence under 18 U.S.C.

§ 3582(c)(1)(A) “to time served, imposing a term of supervised release of about six months in addition to the three years [already] imposed . . . to be served on home detention.” Mot. [24]. Franco claims that her medical condition, coupled with the ongoing novel Coronavirus pandemic, provide “extraordinary and compelling reasons” to justify her release from confinement. 18 U.S.C. § 3582(c)(1)(A). Because Franco has not yet exhausted her administrative remedies under § 3582(c)(1)(A), her motion is denied without prejudice.

I. Facts and Procedural History

On March 14, 2017, Franco pleaded guilty to violating 18 U.S.C. § 1952(a)(3) based on her role in transporting drugs and the proceeds of drug sales between Texas and Mississippi. On January 23, 2018, the Court sentenced Franco to 37 months’ imprisonment, with a self-report date of March 3, 2018.

Franco, a 30-year-old Hispanic female, suffers from hypertension. At the time she filed her motion, Franco was housed at Federal Prison Camp Bryan in Bryan, Texas, but she has since been moved to the Residential Reentry Management facility in San Antonio, Texas. According to the Bureau of Prisons (BOP) website, Franco’s projected date of release from the halfway house is October 22, 2020.

II. Analysis

The threshold issue is whether the Court has authority to consider Franco's motion. She invokes 18 U.S.C. § 3582(c)(1)(A)(i), which states:

The court *may not* modify a term of imprisonment once it has been imposed except that . . . 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 . . . extraordinary and compelling reasons warrant such a reduction . . .

(Emphasis added). The parties agree that Franco did not exhaust as contemplated by the statute.

Mot. [24] ¶ 32; Resp. [26] at 7.¹

Despite that shortcoming, Franco says “[t]he Court can waive the 30-day requirement for exhaustion of administrative remedies due to the high risk that Ms. Franco could become infected with COVID-19.” Reply [28] at 7. In making that argument, Franco abandons the statutory text and overlooks relevant Supreme Court precedent.

The Court's analysis of the statutory exhaustion requirement “begins with the text.” *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016). As noted, § 3582(c)(1) states that “the court may not” modify Gates's sentence until she exhausts her remedies. Nothing in § 3582(c) grants authority to waive this requirement.

Franco's legal authority does not say otherwise. According to her, “courts throughout the country have continued to waive the administrative exhaustion requirements under the First Step

¹ When the Court discusses § 3582(c)'s exhaustion requirement, it refers to either of the two alternatives provided by the statute: complete exhaustion of denial of a request that BOP file a motion on the inmate's behalf *or* the expiration of 30 days from that request with no response from BOP.

Act, where circumstances warrant.” Reply [28] at 8. To support that contention, Franco cites cases where the inmates sought sentence modifications under different First Step Act provisions through petitions filed under 28 U.S.C. § 2241. *See Gurzi v. Marques*, No. 18-CV-3104-NEB-KMM, 2019 WL 6481212, at *2 (D. Minn. Oct. 10, 2019); *Washington v. Bur. of Prisons*, No. 1:19-CV-01066, 2019 WL 6255786, at *2 (N.D. Ohio July 3, 2019). Significantly though, the exhaustion requirements for § 2241 are judicially created. *See Mayberry v. Pettiford*, 74 F. App’x 299, 299 (5th Cir. 2003) (noting that exhaustion under § 2241 is a judicially created mandate); *see also Leuth v. Beach*, 498 F.3d 795, 797 n.3 (8th Cir. 2007) (explaining that the exhaustion requirement under 2241 is “judicially created, not jurisdictional”).

When—as here—Congress requires exhaustion, the obligations become mandatory. The United States Supreme Court explained why in *Ross v. Blake*, while examining the statutory exhaustion requirements under the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a). 136 S. Ct. at 1855.² Although the PLRA itself requires exhaustion, the Fourth Circuit Court of Appeals concluded that when “special circumstances” exist, district courts have authority to waive those exhaustion requirements. *Id.* The Supreme Court disagreed:

No doubt, judge-made exhaustion doctrines, even if flatly stated at first, remain amenable to judge-made exceptions. *See McKart v. United States*, 395 U.S. 185, 193, 89 S. Ct. 1657, 23 L. Ed. 2d 194 (1969) (“The doctrine of exhaustion of administrative remedies . . . is, like most judicial doctrines, subject to numerous exceptions”). But a statutory exhaustion provision stands on a different footing. There, Congress sets the rules—and courts have a role in creating exceptions only if Congress wants them to. For that reason, mandatory exhaustion statutes like the PLRA establish mandatory exhaustion regimes, foreclosing judicial discretion.

Id. at 1857. As for the Fourth Circuit’s special-circumstances test, the Supreme Court held that “the PLRA’s text suggests no limits on an inmate’s obligation to exhaust—irrespective of any

² Section 1997e(a) 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.”

‘special circumstances.’ And that mandatory language means a court may not excuse a failure to exhaust, even to take such circumstances into account.” *Id.* at 1856.

The same is true here. Like the PLRA, § 3582(c)(1)(A) is a statutory exhaustion requirement that offers no discretion for judge-made exceptions. Instead, the statute states that the Court “may not” modify Franco’s sentence until she exhausts her remedies. *See Valentine v. Collier*, 956 F.3d 797, 804 (5th Cir. 2020) (holding that the PLRA’s “exhaustion obligation is mandatory—there are no ‘futility or other [judicially created] exceptions [to the] statutory exhaustion requirements’”) (quoting *Booth v. Churner*, 532 U.S. 731, 741 n.6 (2001)). When a mandatory exhaustion rule like this exists, the Court “must enforce the rule if a party ‘properly raise[s]’ it.” *Fort Bend Cty. v. Davis*, 139 S. Ct. 1843, 1849 (2019). In this case, the Government raised Franco’s failure to exhaust.³

On a final note, the Court shares Franco’s concern for inmate safety. That said, courts from across the country have concluded that they lack authority to waive § 3582(c)(1) even when faced with COVID-19 outbreaks. *See United States v. Raia*, 954 F.3d 594, 597 (3d Cir. 2020) (noting that failure to exhaust “presents a glaring roadblock foreclosing compassionate release at this point”); *see also United States v. Van Sickle*, No. 18-250-JLR, 2020 WL 2219496, at *4 (W.D. Wash. May 7, 2020) (“[B]oth this court and other district courts in the ninth circuit which have considered this issue have nearly unanimously concluded that failure to exhaust administrative remedies is fatal to a compassionate release motion even in light of the

³ Some courts have held that waiver is beside the point because § 3582(c)(1) is jurisdictional. *See, e.g., United States v. Black*, No. 2:12-CR-263-3, 2020 WL 2213892, at *2 (S.D. Ohio May 7, 2020) (“The exhaustion requirement contained in § 3582(c)(1)(A) is jurisdictional and cannot be waived, even due to emergencies such as the COVID-19 pandemic.”) (collecting cases). Whether that is true is debatable but irrelevant in the present case because the Government has not waived exhaustion.

urgency created by COVID-19.”); *United States v. McIndoo*, No. 1:15-CR-142-EAW, 2020 WL 2201970, at *9 (W.D.N.Y. May 6, 2020) (“[I]n the absence of waiver or facts amounting to estoppel, this Court is without the authority to excuse Defendant’s failure to comply with § 3582(c)(1)(A)’s exhaustion requirement.”); *United States v. Pack*, No. 2:17-CR-20002-10, 2020 WL 2174447, at *2 (W.D. Tenn. May 5, 2020) (concluding that because defendant did not exhaust, “[t]he Court does not have authority to consider [his] Motion” under § 3582(c)); *United States v. Roberts*, No. 15-135-01, 2020 WL 2130999, at *2 (W.D. La. May 5, 2020) (“Section 3[58]2(c)(1)(A) does not provide this Court with the equitable authority to excuse Roberts’ failure to exhaust his administrative remedies or to waive the 30-day waiting period.”); *United States v. Brown*, No. 04-CR-143-DRH, 2020 WL 2128861, at *3 (E.D.N.Y. May 5, 2020) (“While the current health emergency warrants consideration of compassionate release requests in an expedited manner, Section 3582 does not allow for the waiver of exhaustion due to exigent circumstances.”); *United States v. Gomez*, No. 2:18-CR-1435-1, 2020 WL 2061537, at *1 (S.D. Tex. Apr. 29, 2020) (observing that “[c]ourts in the Southern District of Texas have ruled that defendants who move for compassionate release still need to exhaust administrative rights . . . in order to bring a motion pursuant to 18 U.S.C. § 3582(c)(1)(A)” (collecting cases)); *United States v. Nevers*, No. 16-088, 2020 WL 1974254, at *2 (E.D. La. Apr. 24, 2020) (“Because the Court cannot consider Petitioner’s request for instant release or home confinement until she has complied with the exhaustion requirements of § 3582(c)(1)(A), the Court must deny the instant motion for failure to comply with the mandatory exhaustion requirements under § 3582(c)(1)(A).”). Franco must comply with § 3582(c)(1)(A).⁴

⁴ A few courts have reached a different conclusion by ignoring the words “may not” in their statutory construction and suggesting that the remaining language in § 3582(c)(1)(A) is less strict than the PLRA language *Ross* found to be mandatory. According to them, inmates may bypass

III. Conclusion

The Court has considered all arguments. Those not addressed would not have changed the outcome. For the foregoing reasons, Franco's Motion for Reduction of Sentence Pursuant to 18 U.S.C. § 3582(c)(1)(A)(i) is denied without prejudice. Franco may re-file her motion once she achieves one of the two avenues for exhaustion under § 3582(c)(1)(A).⁵

exhaustion altogether by simply waiting 30 days after making a request to the warden, so unlike under the PLRA, exhaustion is not mandatory. With deference, the words "may not" are critical. A court "may not reduce a term of imprisonment" unless the inmate first makes a request to the warden and either appeals an adverse ruling or receives no response within 30 days. 18 U.S.C. § 3582(c)(1)(A). That the inmate can proceed after making a request and waiting 30 days does not mean the request was never mandated. Indeed the 30-day waiting period is a statutory futility exception like the one in the PLRA. As *Ross* notes, the PLRA "contains its own, textual exception to mandatory exhaustion" making judge-made exceptions improper. 136 S. Ct. at 1858. Section 1997(e)(a) states that inmates must exhaust "available remedies." Accordingly, inmates "must exhaust available remedies, but need not exhaust unavailable ones." *Ross*, 136 S. Ct. at 1858. At bottom, § 3582(c)(1)(A) provides two exceptions to the dictate that courts "may not reduce a term of imprisonment," both of which require an initial request to the warden. 18 U.S.C. § 3582(c)(1)(A). The statute provides no basis for creating exceptions.

⁵ The Court anticipates that Franco will refile her motion once she exhausts administrative remedies. When she does, the parties may brief the issues they deem relevant. That said, they are instructed to at minimum address three specific points. First, Franco asks the Court to "grant her incarceration of time-served, followed by an additional supervised release term of six months tacked on to the current three years of supervised release" to be "served on home confinement." Mot. [24] ¶ 43. The statutory maximum sentence for the crime of conviction is 5 years' incarceration, making it a Class D felony, for which the maximum available term of supervised release is 3 years. 18 U.S.C. § 1952(a)(3); 18 U.S.C. § 3559(a)(4); 18 U.S.C. § 3583(b)(2). So Franco has already received the maximum period of supervised release permitted by the statute. The parties should address whether Franco's original request could be accommodated considering these facts. Alternatively, Franco argues that the Court "can simply resentence [her] to serve the remainder of her sentence in home confinement." Mot. [24] ¶ 43; *see also* Reply [28] at 20 (requesting that the Court "order her immediate release from prison, and further order that she immediately serve the remainder of her sentence on home confinement"). Section 3582(c)(1)(A) allows the court to "modify the term of imprisonment," but it does not mention modifying the physical location where the defendant serves her term. Some courts have therefore held that they lacked authority to order a defendant to home confinement. *See, e.g.*, *United States v. Johnson*, No. CR 17-165, 2020 WL 2526965, at *2 (E.D. La. May 18, 2020). The parties should address this point as well. Finally, the parties should address whether Franco's purported health condition creates an extraordinary and compelling reason to modify the sentence considering the incidents of COVID-19 at her current facility.

SO ORDERED AND ADJUDGED this the 10th day of June, 2020.

s/ Daniel P. Jordan III
CHIEF UNITED STATES DISTRICT JUDGE

United States Court of Appeals
for the Fifth Circuit

No. 20-60473

United States Court of Appeals
Fifth Circuit

FILED

September 3, 2020

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

ZAIRA FRANCO,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:17-CR-33-1

Before BARKSDALE, ELROD, and Ho, *Circuit Judges.*

JENNIFER WALKER ELROD, *Circuit Judge:*

Zaira Franco appeals the denial of her motion for reduction of sentence (commonly known as a motion for compassionate release), filed pursuant to the First Step Act. The question on appeal is whether Franco is excused from that statute's textual requirement that she file a request with the Bureau of Prisons before filing her motion in federal court. We conclude that she is not so excused, and we affirm the district court's denial of her motion.

I.

In January 2018, Zaira Franco was sentenced to serve 37 months in prison, followed by three years of supervised release. Franco resides at the Residential Reentry Management Facility (colloquially known as a halfway house) in San Antonio, Texas, and has a scheduled release date of October 22, 2020.

In April 2020, pursuant to 18 U.S.C. § 3582(c)(1)(A), she filed a COVID-19 related motion for reduction of sentence in the district court. In her motion, Franco conceded that she had failed to comply with the statute's procedural commands, but requested that due to the COVID-19 pandemic, the requirements "as set out in 18 U.S.C. § 3582(c)(1)(A) . . . be excused due to exigent circumstances." The district court denied the motion without prejudice and noted that "Franco may re-file her motion once she achieves one of the two avenues for exhaustion under § 3582(c)(1)(A)."

II.

As a general rule, federal courts "may not modify a term of imprisonment once it has been imposed." 18 U.S.C. § 3582(c). Prior to the passage of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018), federal courts lacked the power to adjudicate motions for compassionate release. Now, however, a "court . . . may reduce the term of imprisonment" upon request by an inmate. 18 U.S.C. § 3582(c)(1)(A). In the words of the statute, courts may hear requests

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

Id.

The text therefore outlines two routes a defendant's motion can follow to be properly before the court. Both routes begin with the defendant requesting that "the Bureau of Prisons" "bring a motion on the defendant's behalf." *Id.*

Franco concedes that she did not request that "the Bureau of Prisons" "bring a motion on [her] behalf." *See id.* Thus, we must determine whether that requirement is jurisdictional (in which case we lack power to hear this case) and if not, whether the requirement is mandatory (in which case Franco cannot prevail on the merits of her motion). We conclude that the requirement is *not* jurisdictional, but that it *is* mandatory. We review both of these questions of statutory interpretation *de novo*. *See United States v. Lauderdale County*, 914 F.3d 960, 964 (5th Cir. 2019).

III.

The Supreme Court distinguishes "between jurisdictional prescriptions and nonjurisdictional claim-processing rules." *Fort Bend Cnty. v. Davis*, 139 S. Ct. 1843, 1849 (2019). The former limit the circumstances in which Article III courts may exercise judicial power; the latter "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011). Provisions are only considered jurisdictional when "the Legislature clearly states that [the] prescription counts as jurisdictional." *Fort Bend Cnty.*, 139 S. Ct. at 1850.

Nothing in the text of this provision indicates that the procedural requirements are jurisdictional. Instead, the provision instructs a defendant to either "fully exhaust[] all administrative rights to appeal" the BOP's failure to bring a motion or wait for thirty days after the warden's receipt of the request before filing a motion in federal court. 18 U.S.C. § 3582(c)(1)(A). We agree with the recent, cogent analysis of this question by the Sixth Circuit: the "language neither 'speak[s] in jurisdictional terms' nor 'refer[s] in any way to the jurisdiction' of the courts." *United States v. Alam*, 960 F.3d

831, 833 (6th Cir. 2020) (Sutton, J.) (alterations in original) (quoting *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982)). The statute's requirement that a defendant file a request with the BOP before filing a motion in federal court is a nonjurisdictional claim-processing rule.

IV.

Next, we must determine whether that statutory requirement is mandatory. We join the other three circuits that have faced the question and conclude that it is. *See Alam*, 960 F.3d at 832; *United States v. Raia*, 954 F.3d 594, 597 (3d Cir. 2020); *United States v. Springer*, No. 20-5000, 2020 WL 3989451, at *3 (10th Cir. July 15, 2020).

The First Step Act, in clear language, specifies what a defendant must do before she files a motion for compassionate release in federal court. Specifically a defendant must submit a request to "the Bureau of Prisons to bring a motion on the defendant's behalf." 18 U.S.C. § 3582(c)(1)(A).

The statute's language is mandatory. Congress has commanded that a "court *may not* modify a term of imprisonment" if a defendant has not filed a request with the BOP. *See id.* § 3582(c) (emphasis added). This rule "seek[s] to promote the orderly process of litigation by requiring that the parties take certain procedural steps at certain specified times." *Henderson*, 562 U.S. at 435. It is a paradigmatic mandatory claim-processing rule. And because the government properly raised the rule in the district court, this "court *must* enforce the rule." *Pierre-Paul v. Barr*, 930 F.3d 684, 692 (5th Cir. 2019) (emphasis added), *cert. denied*, 206 L. Ed. 2d 854 (Apr. 27, 2020).

Franco's arguments to the contrary are unavailing. First, she argues that the requirement cannot be mandatory because the statute permits two different routes a defendant may take before filing a motion in court. But both of those routes (filing a motion after the BOP's denial or filing a motion 30 days after receipt by the warden) require the defendant to first file a request with the BOP. And Franco concedes she never filed such a request.

Nor are we inclined to deviate from this clear text in pursuit of the statute’s broader “purpose” or “intent.” We need not dive “inside Congress’s mind” to determine the statutory intent here. *Cf.* John F. Manning, *Inside Congress’s Mind*, 115 Colum. L. Rev. 1911, 1919 (2015) (noting that textualists, legal realists, modern pragmatists, and legal process scholars share doubts about “an actual subjective congressional decision about the litigated issue”). Congress used clear language: all requests for compassionate release must be presented to the Bureau of Prisons before they are litigated in the federal courts. When the text is clear, that is “the end of the construction.” *Hightower v. Tex. Hosp. Ass’n*, 65 F.3d 443, 450 (5th Cir. 1995). We need go no further.

Finally, Franco maintains that the statutory requirement does not apply to her because she resides in a halfway house. The statute refers to “receipt of such a request *by the warden of the defendant’s facility.*” 18 U.S.C. § 3582(c)(1)(A) (emphasis added). Franco notes that she “is housed at a Residential Reentry Management Facility, which has no warden.” But this apparent problem has a simple solution. Bureau of Prisons regulations define the “warden” to include “the chief executive officer of . . . any federal penal or correctional institution or facility.” 28 C.F.R. § 500.1(a); *cf. United States v. Campagna*, 16 CR. 78-01 (LGS), 2020 WL 1489829, at *3 (S.D.N.Y. Mar. 27, 2020) (holding that “the denial of Defendant’s request by the Residential Re-entry Manager suffices to exhaust his administrative rights”). Franco is free to file her request with the chief executive officer of her facility.

* * *

This opinion will, at the least, provide clarity about this important relief. Definite legal rules are knowable *ex ante*, evenhanded in application, and favor certainty and predictability. *Cf.* Lon Fuller, *Morality of Law* 39 (1969) (identifying, *inter alia*, generality, public accessibility, clarity, and constancy as requirements of a legal system). In this case, the district judge denied Franco’s motion without prejudice, and allowed her to “re-file her

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motion once she achieve[d] one of the two avenues for exhaustion under § 3582(c)(1)(A).” Instead, Franco appealed, hoping for a favorable ruling. Going forward, no other defendants need face this uncertainty. Those who seek a motion for compassionate relief under the First Step Act must first file a request with the BOP. The judgment of the district court is AFFIRMED and Zaira Franco remains free to file, in the first instance, a request with the Bureau of Prisons.

United States Court of Appeals
for the Fifth Circuit

No. 20-60473

United States Court of Appeals
Fifth Circuit

FILED

September 3, 2020

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

ZAIRA FRANCO,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:17-CR-33-1

Before BARKSDALE, ELROD, and Ho, *Circuit Judges.*

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

2020 WL 5249369

Only the Westlaw citation is currently available.
United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.

Zaira FRANCO, Defendant-Appellant.

No. 20-60473

|

FILED September 3, 2020

Synopsis

Background: Federal inmate moved for compassionate release based on COVID-19 pandemic. The United States District Court for the Southern District of Mississippi, [Daniel P. Jordan](#), Chief Judge, [2020 WL 3086251](#), denied motion for failure to exhaust administrative remedies. Inmate appealed.

[Holding:] The Court of Appeals, [Elrod](#), Circuit Judge, held that as an issue of first impression in the Circuit, requirement in First Step Act that a defendant file a request for reduction of sentence with Bureau of Prisons (BOP) before filing a motion in federal court is mandatory.

Affirmed.

Procedural Posture(s): Appellate Review; Sentencing or Penalty Phase Motion or Objection.

West Headnotes (7)

[1] Federal Courts [Grounds or Exclusions of Jurisdiction in General](#)

[170B](#) Federal Courts

[170BII](#) Jurisdiction, Powers, and Authority in General

[170BII\(A\)](#) In General

[170Bk2030](#) Grounds or Exclusions of Jurisdiction in General

[170Bk2031](#) In general

Jurisdictional prescriptions limit the circumstances in which Article III courts may exercise judicial power. [U.S. Const. art. 3, § 1.](#)

[2] Federal Courts [Grounds or Exclusions of Jurisdiction in General](#)

[170B](#) Federal Courts

[170BII](#) Jurisdiction, Powers, and Authority in General

[170BII\(A\)](#) In General

[170Bk2030](#) Grounds or Exclusions of Jurisdiction in General

[170Bk2031](#) In general

Non-jurisdictional claim processing rules seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times.

[2 Cases that cite this headnote](#)

[3] Federal Courts [Grounds or Exclusions of Jurisdiction in General](#)

[170B](#) Federal Courts

[170BII](#) Jurisdiction, Powers, and Authority in General

[170BII\(A\)](#) In General

[170Bk2030](#) Grounds or Exclusions of Jurisdiction in General

[170Bk2031](#) In general

Provisions are only considered jurisdictional when the Legislature clearly states that the prescription counts as jurisdictional.

[4] Sentencing and Punishment [Proceedings](#)

[350H](#) Sentencing and Punishment

[350HXII](#) Reconsideration and Modification of Sentence

[350HXII\(C\)](#) Proceedings

[350HXII\(C\)1](#) In General

[350Hk2270](#) In general

Requirement in the First Step Act that a defendant file a request for reduction of sentence with the Bureau of Prisons (BOP) before filing a motion in federal court is a nonjurisdictional claim-processing rule. [18 U.S.C.A. § 3582\(c\)\(1\)\(A\)](#).

[21 Cases that cite this headnote](#)

[5] Sentencing and Punishment [Proceedings](#)

[350H](#) Sentencing and Punishment

APPENDIX 4

[350HXII](#) Reconsideration and Modification of Sentence

[350HXII\(C\)](#) Proceedings

[350HXII\(C\)1](#) In General

[350Hk2270](#) In general

Requirement in the First Step Act that a defendant file a request for reduction of sentence with the Bureau of Prisons (BOP) before filing a motion in federal court is mandatory; rule states that a “court may not modify a term of imprisonment” if a defendant has not filed a request with the BOP.  [18 U.S.C.A. § 3582\(c\)\(1\)\(A\)](#).

[24 Cases that cite this headnote](#)

[6] [Statutes](#)  Absence of Ambiguity; Application of Clear or Unambiguous Statute or Language

[361](#) Statutes

[361III](#) Construction

[361III\(C\)](#) Clarity and Ambiguity; Multiple Meanings

[361k1107](#) Absence of Ambiguity; Application of Clear or Unambiguous Statute or Language

[361k1108](#) In general

When the text is clear, that is the end of the statutory construction.

[7] [Sentencing and Punishment](#)  Proceedings

[350H](#) Sentencing and Punishment

[350HXII](#) Reconsideration and Modification of Sentence

[350HXII\(C\)](#) Proceedings

[350HXII\(C\)1](#) In General

[350Hk2270](#) In general

Inmate housed at residential reentry management facility was required to file a request for release with the Bureau of Prisons (BOP) prior to filing motion for compassionate relief under the First Step Act; although facility had no warden, inmate could file request with chief executive officer of facility.  [18 U.S.C.A. § 3582\(c\)\(1\)\(A\)](#).

[18 Cases that cite this headnote](#)

Appeal from the United States District Court for the Southern District of Mississippi, USDC No. 3:17-CR-33-1, [Daniel P. Jordan, III](#), Chief Judge

Attorneys and Law Firms

[Gregory Layne Kennedy](#), Esq., Assistant U.S. Attorney, Meghan McCalla, [Christopher L. Wansley](#), Assistant U.S. Attorney, U.S. Attorney's Office, Southern District of Mississippi, Jackson, MS, [Gaines H. Cleveland](#), Assistant U.S. Attorney, U.S. Attorney's Office, Southern District of Mississippi, Gulfport, MS, for Plaintiff-Appellee

Jacinta Hall, [Thomas Creacher Turner, Jr.](#), Esq., Federal Public Defender's Office, Southern District of Mississippi, Jackson, MS, for Defendant-Appellant

Before [Barksdale](#), [Elrod](#), and [Ho](#), Circuit Judges.

Opinion

[Jennifer Walker Elrod](#), Circuit Judge:

***1** Zaira Franco appeals the denial of her motion for reduction of sentence (commonly known as a motion for compassionate release), filed pursuant to the First Step Act. The question on appeal is whether Franco is excused from that statute's textual requirement that she file a request with the Bureau of Prisons before filing her motion in federal court. We conclude that she is not so excused, and we affirm the district court's denial of her motion.

I.

In January 2018, Zaira Franco was sentenced to serve 37 months in prison, followed by three years of supervised release. Franco resides at the Residential Reentry Management Facility (colloquially known as a halfway house) in San Antonio, Texas, and has a scheduled release date of October 22, 2020.

In April 2020, pursuant to  [18 U.S.C. § 3582\(c\)\(1\)\(A\)](#), she filed a COVID-19 related motion for reduction of sentence in the district court. In her motion, Franco conceded that she had failed to comply with the statute's procedural commands, but requested that due to the COVID-19 pandemic, the requirements “as set out in  [18 U.S.C. § 3582\(c\)\(1\)\(A\)](#) ... be excused due to exigent circumstances.” The district court

denied the motion without prejudice and noted that “Franco may re-file her motion once she achieves one of the two avenues for exhaustion under § 3582(c)(1)(A).”

II.

As a general rule, federal courts “may not modify a term of imprisonment once it has been imposed.” 18 U.S.C. § 3582(c). Prior to the passage of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018), federal courts lacked the power to adjudicate motions for compassionate release. Now, however, a “court … may reduce the term of imprisonment” upon request by an inmate. 18 U.S.C. § 3582(c)(1)(A). In the words of the statute, courts may hear requests

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....

Id.

The text therefore outlines two routes a defendant's motion can follow to be properly before the court. Both routes begin with the defendant requesting that “the Bureau of Prisons” “bring a motion on the defendant's behalf.” *Id.*

Franco concedes that she did not request that “the Bureau of Prisons” “bring a motion on [her] behalf.” *See id.* Thus, we must determine whether that requirement is jurisdictional (in which case we lack power to hear this case) and if not, whether the requirement is mandatory (in which case Franco cannot prevail on the merits of her motion). We conclude that the requirement is *not* jurisdictional, but that it *is* mandatory. We review both of these questions of statutory interpretation *de novo*. *See* [United States v. Lauderdale County](#), 914 F.3d 960, 964 (5th Cir. 2019).

III.

[1] [2] [3] The Supreme Court distinguishes “between jurisdictional prescriptions and nonjurisdictional claim-processing rules.” [Fort Bend Cnty. v. Davis](#), — U.S. —, 139 S. Ct. 1843, 1849, 204 L.Ed.2d 116 (2019). The former limit the circumstances in which Article III courts may exercise judicial power; the latter “seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times.” [Henderson v. Shinseki](#), 562 U.S. 428, 435, 131 S.Ct. 1197, 179 L.Ed.2d 159 (2011). Provisions are only considered jurisdictional when “the Legislature clearly states that [the] prescription counts as jurisdictional.” [Fort Bend Cnty.](#), 139 S. Ct. at 1850.

*2 [4] Nothing in the text of this provision indicates that the procedural requirements are jurisdictional. Instead, the provision instructs a defendant to either “fully exhaust[] all administrative rights to appeal” the BOP's failure to bring a motion or wait for thirty days after the warden's receipt of the request before filing a motion in federal court. 18 U.S.C. § 3582(c)(1)(A). We agree with the recent, cogent analysis of this question by the Sixth Circuit: the “language neither ‘speak[s] in jurisdictional terms’ nor ‘refer[s] in any way to the jurisdiction’ of the courts.” [United States v. Alam](#), 960 F.3d 831, 833 (6th Cir. 2020) (Sutton, J.) (alterations in original) (quoting [Zipes v. Trans World Airlines, Inc.](#), 455 U.S. 385, 394, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982)). The statute's requirement that a defendant file a request with the BOP before filing a motion in federal court is a nonjurisdictional claim-processing rule.

IV.

[5] Next, we must determine whether that statutory requirement is mandatory. We join the other three circuits that have faced the question and conclude that it is. *See* [Alam](#), 960 F.3d at 832; [United States v. Raia](#), 954 F.3d 594, 597 (3d Cir. 2020); [United States v. Springer](#), No. 20-5000, — F.3d —, —, 2020 WL 3989451, at *3 (10th Cir. July 15, 2020).

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The statute's language is mandatory. Congress has commanded that a “court *may not* modify a term of imprisonment” if a defendant has not filed a request with the BOP. *See id.* [§ 3582\(c\)](#) (emphasis added). This rule “seek[s] to promote the orderly process of litigation by requiring that the parties take certain procedural steps at certain specified times.” [Henderson, 562 U.S. at 435, 131 S.Ct. 1197](#). It is a paradigmatic mandatory claim-processing rule. And because the government properly raised the rule in the district court, this “court *must* enforce the rule.” [Pierre-Paul v. Barr, 930 F.3d 684, 692 \(5th Cir. 2019\)](#) (emphasis added), *cert. denied*, — U.S. —, — S.Ct. —, 206 L. Ed. 2d 854 (2020).

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[6] Nor are we inclined to deviate from this clear text in pursuit of the statute's broader “purpose” or “intent.” We need not dive “inside Congress's mind” to determine the statutory intent here. *Cf.* John F. Manning, *Inside Congress's Mind*, 115 Colum. L. Rev. 1911, 1919 (2015) (noting that textualists, legal realists, modern pragmatists, and legal process scholars share doubts about “an actual subjective congressional decision about the litigated issue”). Congress used clear language: all requests for compassionate release must be presented to the Bureau of Prisons before they are litigated in the federal courts. When the text is clear, that is “the end of the construction.” [Hightower v. Tex. Hosp. Ass'n, 65 F.3d 443, 450 \(5th Cir. 1995\)](#). We need go no further.

[7] Finally, Franco maintains that the statutory requirement does not apply to her because she resides in a halfway house. The statute refers to “receipt of such a request by the warden of the defendant's facility.” [18 U.S.C. § 3582\(c\)\(1\)\(A\)](#) (emphasis added). Franco notes that she “is housed at a Residential Reentry Management Facility, which has no warden.” But this apparent problem has a simple solution. Bureau of Prisons regulations define the “warden” to include “the chief executive officer of ... any federal penal or correctional institution or facility.” [28 C.F.R. § 500.1\(a\)](#); *cf.* [United States v. Campagna, 16 CR. 78-01 \(LGS\), — F.Supp.3d —, —, 2020 WL 1489829, at *3 \(S.D.N.Y. Mar. 27, 2020\)](#) (holding that “the denial of Defendant's request by the Residential Re-entry Manager suffices to exhaust his administrative rights”). Franco is free to file her request with the chief executive officer of her facility.

*3

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This opinion will, at the least, provide clarity about this important relief. Definite legal rules are knowable *ex ante*, evenhanded in application, and favor certainty and predictability. *Cf.* Lon Fuller, *Morality of Law* 39 (1969) (identifying, *inter alia*, generality, public accessibility, clarity, and constancy as requirements of a legal system). In this case, the district judge denied Franco's motion without prejudice, and allowed her to “re-file her motion once she achieve[d] one of the two avenues for exhaustion under [§ 3582\(c\)\(1\)\(A\)](#).” Instead, Franco appealed, hoping for a favorable ruling. Going forward, no other defendants need face this uncertainty. Those who seek a motion for compassionate relief under the First Step Act must first file a request with the BOP. The judgment of the district court is AFFIRMED and Zaira Franco remains free to file, in the first instance, a request with the Bureau of Prisons.

All Citations

--- F.3d ----, 2020 WL 5249369