

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

In re Mathew Ryan Byrd – PETITIONER

**ON PETITION FOR A WRIT OF MANDAMUS TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

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QUESTION PRESENTED

- I. This Court has long held that it, “has power to issue a mandamus, in the exercise of its appellate jurisdiction, and that the writ will lie in a proper case to direct a subordinate Federal court to decide a pending cause. Power to issue the writ of mandamus to the Circuit Courts is exercised by this court to compel the Circuit Court to proceed to a final judgment or decree in a cause, in order that this court may exercise the jurisdiction of review given by law.” *Ins. Co. v. Comstock*, 83 U.S. 258, 270 (1872).

Accordingly, the issue presented is whether the United States Court of Appeals for the Fourth Circuit has abused its discretion in failing to issue a decision as to Petitioner’s pending appeal of his Motion for Compassionate Release, as to which briefing was completed more than four (4) months ago, and in failing to issue a decision as to Petitioner’s Motion to Expedite, as to which briefing was completed more than six (6) weeks ago, and Petitioner’s pro se Motion for Judicial Notice, which was filed nearly three (3) weeks ago, in light of the emergent nature of the ongoing COVID-19 pandemic and serious health risks posed to Petitioner through continued incarceration?

PARTIES TO THE PROCEEDING

Petitioner (appellant in the United States Court of Appeals for the Fourth Circuit) is Mathew Ryan Byrd.

Respondent in this Court is the United States Court of Appeals for the Fourth Circuit.

IN THE SUPREME COURT OF THE UNITED STATES

No. _____

IN RE MATHEW RYAN BYRD, *Petitioner*,

ON PETITION FOR A WRIT OF MANDAMUS TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF MANDAMUS

Petitioner, Mathew Ryan Byrd (“Petitioner”), respectfully petitions this Court pursuant to Supreme Court Rule 20.3 for a writ of mandamus (“Petition”) directing the United States Court of Appeals for the Fourth Circuit to enter a decision as to the pending appeal of Petitioner’s Motion for Compassionate Release.

OPINION BELOW

On January 29, 2021, the United States District Court for the Southern District of West Virginia (“District Court”) entered an Order denying Petitioner’s Second Motion for Compassionate Release in the matter of *United States v. Mathew Ryan Byrd*, no. 19-cr-080. A7.

On February 5, 2021, Petitioner filed a Notice of Appeal with the United States Court of Appeals for the Fourth Circuit (“Fourth Circuit”) as to the District Court’s January 29, 2021 Order. A1. Petitioner’s appellate brief was filed with the Fourth Circuit on March 23, 2021, the Government’s response brief was filed on April 14, 2021, and Petitioner’s reply brief was filed on April 21, 2021, in the matter of *United States v. Mathew Ryan Byrd*, no. 21-6192. A21-22.

On June 23, 2021, Petitioner filed with the Fourth Circuit a Motion to Expedite disposition of his pending appeal pursuant to Fourth Circuit Local Rule 12(c). A21-22. The Government filed a response in opposition Petitioner’s Motion to Expedite on July 6, 2021, and Petitioner filed a reply to the Government’s response on July 7, 2021. A21-22.

On August 6, 2021, Mr. Byrd filed a pro se Motion for Judicial Notice requesting that the Fourth Circuit take note of the spread of and risks posed by the COVID-19 “Delta variant”. A22.

As of the filing of this Petition, the Fourth Circuit has failed to issue a decision as to Petitioner's appeal, Petitioner's Motion to Expedite, or Petitioner's pro se Motion for Judicial Notice. *See* A19-22.

The District Court's February 4, 2020 Judgment, September 1, 2020 Order denying Petitioner's pro se First Motion for Compassionate Release, October 16, 2020 Order denying Petitioner's Motion for Reconsideration, January 29, 2021 Order denying Petitioner's Second Motion for Compassionate Release, as well as Petitioner's February 5, 2021 Notice of Appeal to the Fourth Circuit, and the Fourth Circuit Docket as of August 24, 2021 in Petitioner's matter are enclosed herein.

JURISDICTION

This Court has proper jurisdiction pursuant to 28 U.S.C. § 1651(a) and *Ins. Co. v. Comstock*, 83 U.S. 258, 270 (1872) (holding that the Supreme Court has jurisdiction to, among other things, issue writs of mandamus to the Circuit Courts).

The District Court had jurisdiction to decide Petitioner's Second Motion for Compassionate Release pursuant to 18 U.S.C. § 3231, and the Fourth Circuit had jurisdiction to hear Petitioner's appeal of the District Court's denial of that motion pursuant to 28 U.S.C. § 1291.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3582(c) 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 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; or

(ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g);

and that such a reduction is consistent with applicable policy statements

issued by the Sentencing Commission;
and

(B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure; and

(2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.”

28 U.S.C. § 1651(a) provides,

“The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”

The Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136,

§ 12003(b)(2), 134 Stat. 281, 516 (2020) (“CARES Act”) provides,

“(2) HOME CONFINEMENT AUTHORITY.—During the covered emergency period, if the Attorney General finds that emergency conditions will materially affect the functioning of the Bureau, the Director of the Bureau may lengthen the maximum amount of time for which the Director is authorized to place a prisoner in home confinement under the first sentence of section 3624(c)(2) of title 18, United States Code, as the Director determines appropriate.”

STATEMENT OF THE CASE¹

Mr. Byrd pled guilty before the District Court in the underlying criminal matter on July 2, 2019 to one count of distribution of heroin in violation of 21 U.S.C. § 841(a)(1) and one count of possession of a firearm in furtherance of a drug trafficking offense in violation of 18 U.S.C. § 924(c)(1)(A).

On February 3, 2020, very shortly before the COVID-19 pandemic took hold in the United States, the District Court sentenced Mr. Byrd to forty-six (46) months' imprisonment as to the heroin distribution offense and sixty (60) months' imprisonment as to the firearms offense, to be served consecutively. A12-18. The sentence also included a five-year (5) term of supervised release and a special assessment of two-hundred dollars (\$200.00). A12-18.

Mr. Byrd was subsequently transferred to the custody of the Bureau of Prisons ("BOP") and is presently serving his sentence at the FCI McDowell facility.

The conduct which ultimately resulted in Mr. Byrd's conviction and sentence in this matter derives, in large part, from Mr. Byrd's longtime addiction to opiates, stemming from a very serious car accident which he suffered in year 2010, resulting in a broken nose, broken jaw, and broken eye socket. As a result of the accident, Mr. Byrd required multiple surgeries and had his jaw wired shut for six (6) weeks. This led to a dependency on the prescription pain killer Percocet, which escalated into a

¹ The medical records, and CDC, BOP, and other administrative data, articles, and reports, referenced herein were submitted to the Fourth Circuit as part of the Joint Appendix, Sealed Volume of the Joint Appendix, Supplemental Appendix, and Sealed Volume of the Supplemental Appendix are not enclosed herein, due to the sealed nature of many of the records. See A19-22.

severe dependency on heroin and, ultimately, caused him to begin selling heroin, largely to fund his own addiction.

Unfortunately, the United States is in the midst of an opiate crisis, which is especially widespread in Mr. Byrd's home state of West Virginia. Mr. Byrd is, tragically, one of millions who have succumbed to this crisis, leading to his conduct in this matter.

Mr. Byrd had no known substance abuse issues prior to the car accident, and his subsequent heroin addiction has caused him a slew of major health problems, including at least one (1) near-fatal overdose resulting in a six-day (6) hospital stay, as well as diabetes, serious skin problems, and serious cardiovascular and kidney issues. In addition, Mr. Byrd has suffered from clinical depression and anxiety since at least the age of eighteen (18).

These serious underlying health issues impose a major risk upon Mr. Byrd within the FCI McDowell facility, in light of the COVID-19 pandemic, which overtook the United States shortly after Mr. Byrd's began serving his sentence, and these risks have worsened with the emergence of the highly contagious Delta Variant of COVID-19. As a result, Mr. Byrd initially sought administrative remedies for early release to home confinement, in light of the major health risks posed to him if he were to contract the virus while confined at FCI McDowell.

Namely, on April 7, 2020 Mr. Byrd's counsel submitted a request for compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A)(i) to the Warden of FCI McDowell. Upon instruction of the FCI McDowell facility, Counsel resubmitted the

request on April 16, 2020, with a follow-up request sent on April 30, 2020. Counsel also submitted this request to Mr. Byrd's Case Manager, James White, on April 20, 2020 and to his Case Management Coordinator Ms. Rife ("CMC Rife") on April 23, 2020. Mr. Byrd was advised on or around May 4, 2020 that the Warden had denied the request for compassionate relief.

Subsequently, on December 2, 2020, Mr. Byrd's Appellate Counsel submitted a second request for compassionate release to CMC Rife, inclusive of, among other things, the additional medical records and information related to the increasing number of COVID-19 cases at the FCI McDowell facility, obtained after Mr. Byrd's initial requests were submitted in April, 2020.

Mr. Byrd was subsequently notified by the FCI McDowell facility that the December 2, 2020 request for compassionate release was denied.

On August 27, 2020, after exhausting his administrative remedies, Mr. Byrd filed a pro se motion to reduce his sentence pursuant to 18 U.S.C. § 3582(c)(1)(A)(i) on the basis of his underlying medical conditions and the ongoing COVID-19 pandemic.²

² It is noted that, separate and apart from his two (2) motions for compassionate release, and related applications, Petitioner also appealed the District Court's judgment and sentence to the Fourth Circuit in the matter of *United States v. Mathew Ryan Byrd*, no. 20-4116. On January 7, 2021, the Fourth Circuit entered a judgment order and unpublished per curiam opinion in that matter upholding the District Court's judgment and sentence. On January 13, 2021, Mr. Byrd submitted, through counsel, a petition for a panel rehearing or rehearing en banc as to its denial of the appeal of his judgment and sentence. The petition for a panel rehearing or rehearing en banc was denied by the Fourth Circuit on February 2, 2021, with a mandate issued on February 10, 2021.

Mr. Byrd has filed a pro se petition for a writ of certiorari with this Court on March 16, 2021, as to his judgment and sentence, which was denied by this Court by way of an April 20, 2021 order.

Finally, Mr. Byrd also submitted, on July 19, 2021, to the District Court a pro se motion to reduce his sentence pursuant to 28 U.S.C. § 2255, which remains under review by the District Court.

The District Court denied Mr. Byrd's pro se motion by way of a September 1, 2020 Order, in which it held that,

“Even if these conditions show that he has a particularized susceptibility to COVID-19, the Bureau of Prisons reports that at this time only 1 staff member and 0 inmates at FCI McDowell have confirmed active cases of COVID-19 . . . While the Court understands Mr. Byrd's concerns regarding COVID-19, the mere possibility of contracting the virus is not a sufficiently ‘extraordinary and compelling’ reason to justify a reduction in sentence under 18 U.S.C. § 3582(c)(1)(A)(i).”

A2-A5.

On September 25, 2020, Mr. Byrd filed with the District Court, through counsel, a motion for reconsideration of his pro se motion to reduce his sentence.

The District Court denied Mr. Byrd's motion for reconsideration by way of an October 26, 2020 order, in which it held that,

“While the Court is not unsympathetic to Mr. Byrd's concerns about contracting COVID19 and does not doubt that Mr. Byrd has experienced or sought medical care for his claimed maladies in the past, the Court finds there is a lack of evidence to support a finding that he is currently suffering from a serious condition that makes him particularly susceptible to the coronavirus or otherwise merits relief under § 3582(c)(1)(A)(i). . . . Moreover, consistent with its previous order, the Court finds that Mr. Byrd has failed to show that he is at a particularized risk of contracting COVID-19. Mr. Byrd is incarcerated at FCI McDowell. While Mr. Byrd has indicated that the number of cases at FCI McDowell has increased since he filed his first motion, ECF No. 93, at 1, the Court finds that the rates of COVID-19 at the facility are still low.”

A6.

Petitioner's extensive filings further evidence the urgency of his situation and the health risks posed to him through continued incarceration during the ongoing COVID-19 pandemic.

On January 10, 2021³, Mr. Byrd submitted, through counsel, to the District Court his second motion to reduce his sentence, inclusive of additional medical records to illustrate the severity of Mr. Byrd's underlying conditions, as well as data from the Bureau of Prisons evidencing a substantial increase in the number of COVID-19 cases within the FCI McDowell facility.

Nonetheless, despite receiving additional evidence of Mr. Byrd's medical conditions and the significant spread of COVID-19 within the facility, the District Court denied Mr. Byrd's second Motion by way of January 29, 2021 order. A7-11. In its order, the District Court stated,

“Despite the increase in cases at FCI McDowell, the Court finds that Byrd has not shown a particularized susceptibility to the virus that would warrant relief under § 3582(c)(1)(A). . . . All in all, the filings in this case do not indicate that Byrd is currently struggling with maintain his health or that the BOP is unresponsive to his needs.”

A7-11.

On February 5, 2021, Mr. Byrd, through Counsel, filed a notice of appeal with the Fourth Circuit to request review of the District Court's denial of his Second Motion for Compassionate Release. A1.

Mr. Byrd subsequently filed his appellate brief on March 23, 2021, in which he argued, in summary, that the District Court abused its discretion in denying his

³ On October 19, 2020, a second pro se Motion for Compassionate Release was mistakenly filed on Mr. Byrd's behalf and without his authorization by a paralegal from Fait Accompli Legal Services, which he had previously hired for assistance with his initial motion. This second motion was denied by the District Court as moot on November 5, 2020. Because the second pro se motion was submitted by Fait Accompli Legal Services by mistake and without authorization, Mr. Byrd submitted, on November 10, 2020, a motion to withdraw the unauthorized pro se motion, which was denied by the District Court as moot on November 12, 2020 on the same basis as the previous denial.

Second Motion for Compassionate Release because Mr. Byrd established, through the submission of the motion and supporting exhibits, inclusive of extensive medical records and data from the Bureau of Prisons regarding the rapid spread of COVID-19 within federal prison facilities, including FCI McDowell, that “extraordinary and compelling reasons” exist in support of reducing his sentencing from incarceration to home confinement, in light of the risks posed to him due to the risk of contracting COVID-19 at the FCI McDowell facility, as well as establishing that the factors set forth in 18 U.S.C. § 3553(a) support reducing his sentence from incarceration to home confinement and that he has a release plan in place should such a reduction be granted. A21-22.

Simultaneous with the filing of his appellate brief, Mr. Byrd filed a Joint Appendix and Sealed Volume of the Joint Appendix. A21-22.

The Government filed a response brief in opposition on April 14, 2021, along with a supplemental appendix, and Mr. Byrd filed a reply brief on April 21, 2021. A21-22.

On May 10, 2021, Mr. Byrd submitted a sealed supplemental appendix volume, with permission of the Fourth Circuit. A21-22.

On July 23, 2021, Mr. Byrd filed with the Fourth Circuit a Motion to Expedite decision as to the appeal of this Second Motion for Compassionate Release, in light of the serious health risks imposed on Mr. Byrd while incarcerated due to his underlying medical conditions, which he has advised have recently worsened, and the COVID-19

pandemic. A21-22. The Government submitted a response in opposition to Mr. Byrd's Motion to Expedite on July 6, 2021, to which Mr. Byrd submitted a reply on July 7, 2021. A21-22.

On August 6, 2021, Mr. Byrd filed a pro se Motion for Judicial Notice requesting that the Fourth Circuit take note of the spread of the COVID-19 Delta Variant. A21-22.

As of the filing of this Petition, no decision has been rendered by the Fourth Circuit as to Mr. Byrd's pending appeal, his Motion to Expedite, or his pro se Motion for Judicial Notice. *See* A19-23.

This timely Petition followed.

Mr. Byrd is mindful of the fact that the Fourth Circuit has a busy docket and that, perhaps, in many routine matters, a delay of four (4) months may not be considered extensive. In this matter, however, the underlying issues are not routine and may well be a matter of "life or death" for Mr. Byrd because for every day that Mr. Byrd remains confined within the FCI McDowell facility, he is at risk of contracting COVID-19, which could be devastating and potentially lethal, in light of his serious underlying conditions. These risks have worsened with the surge of the Delta Variant.

Mr. Byrd's release would not pose a risk to his community, and he has a release plan in place, including fourteen-day (14) quarantine, should he be granted early release.

Mr. Byrd, moreover, tried to impart the urgency of his appeal to the Fourth Circuit through the filing of his Motion to Expedite and his pro se Motion for Judicial Notice. The Fourth Circuit, however, has failed to render a decision on either of those motions which was filed more than six (6) weeks and nearly three (3) weeks, respectively, prior to the filing of this Petition, just as it has failed to render a decision as to Mr. Byrd's pending appeal.

For these reasons, Mr. Byrd submits that the Fourth Circuit has abused its discretion in delaying to render a decision in his matter and requests that this Court grant a writ of mandamus directing the Fourth Circuit to expedite its decision, in light of the serious health risks posed to Mr. Byrd through continued incarceration.

ARGUMENT IN SUPPORT

28 U.S.C. § 1651(a) provides, "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

In *Comstock*, 83 U.S. at 270, this Court noted,

"Repeated decisions of this court have established the rule that this court has power to issue a mandamus, in the exercise of its appellate jurisdiction, and that the writ will lie in a proper case to direct a subordinate Federal court to decide a pending cause. Power to issue the writ of mandamus to the Circuit Courts is exercised by this court to compel the Circuit Court to proceed to a final judgment or decree in a cause, in order that this court may exercise the jurisdiction of review given by law."

This Court has further held that, “The writ [of a mandamus] is appropriately issued, however, when there is ‘usurpation of judicial power’ or a clear abuse of discretion.” *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964).

For the reasons set forth below, we submit that a writ of mandamus is appropriate in this matter, as the Fourth Circuit has abused its discretion in failing to issue an opinion as to Petitioner’s pending appeal and pending Motion to Expedite, in light of the emergent nature of the health risks posed to Petitioner through continued incarceration.

I. Mr. Byrd Suffers from Serious Underlying Medical Conditions, Putting Him at Risk of Severe Illness or Death from COVID-19.

Mr. Byrd suffers from a serious pulmonary condition and has advised that he has full functioning in only one (1) lung due to his previous bouts with pneumonia and respiratory failure, as well as suffering from kidney disease and gastrointestinal issues and serious skin infection issues. These conditions are due, in large part, to Mr. Byrd’s long and treacherous battle with heroin addiction, and these conditions have been well documented by Mr. Byrd in his filing with the District Court and the Fourth Circuit.

In the October 16, 2020 Order denying Mr. Byrd’s motion for reconsideration of his first motion for a reduction of sentence, the District Court noted:

“Mr. Byrd has provided pre-incarceration medical records that mention complaints and/or diagnoses of shortness of breath; obesity; gastrointestinal issues; a mild ventilatory defect in his lungs; acute kidney injury, pneumonia, and acute respiratory failure related to a heroin overdose in 2015; and a history of skin infections. ECF No. 96, at 6, 7,

8, 14–15, 18, 23. In response, the Government has provided medical records from the Bureau of Prisons that indicate Mr. Byrd has anxiety and depression diagnoses and he is currently prescribed Buspirone and Citalopram to treat those conditions. ECF 112, at 13; ECF No. 115. These records indicate that since his incarceration, Mr. Byrd has not been seen or treated for the illnesses he claims warrant a reduction in his sentence.”

A6.

Following the District Court’s denial of his motion for reconsideration, Mr. Byrd obtained the additional medical records, which then submitted to the District Court. These included records dated September, 2019 from the Carter County facility, where Mr. Byrd was initially detained in this matter, indicating, among other things, that Mr. Byrd was being treated with Albuterol, which according to webmd.com, is used to “used to prevent and treat wheezing and shortness of breath caused by breathing problems (such as asthma, chronic obstructive pulmonary disease).”

Mr. Byrd also submitted to the District Court additional BOP medical records indicating, among other things, that he was treated on February 28, 2020, March 12, 2020, June 10, 2020 for edema on his lower right leg, for which he was prescribed Furosemide, which according to Webmd.com, is used to “reduce extra fluid in the body (edema) caused by conditions such as heart failure, liver disease, and kidney disease [and high blood pressure].”

Mr. Byrd also submitted a Request for Administrative Remedy dated October 23, 2020, indicating that he has been “trying for weeks” to obtain access to his most

recent BOP medical records and to receive treatment for his lung issues and difficulty breathing.

These additional records indicate that Mr. Byrd has in fact received treatment for lung-related issues while incarcerated at the Carter County facility in 2019 and has experienced breathing issues and requested to receive similar treatment at the FCI McDowell facility. The available records indicate, moreover, that Mr. Byrd has received treatment for edema, which can be caused by kidney problems, as recently as June, 2020 while at the FCI McDowell facility.

Mr. Byrd has further advised that the BOP has refused to provide him with access to an Albuterol machine, which is necessary to assist with his breathing, due to the ongoing COVID-19 pandemic, and has failed to provide him with access to adequate medical care, as there is no physician onsite at the FCI McDowell facility.

Mr. Byrd has further advised that a blood work analysis performed on February 10, 2021 indicated that his blood oxygen levels are low and other markers suggesting elevated risk for kidney and heart disease are present and that, despite being due for routine blood tests, he has been unable to receive recent testing at the FCI McDowell facility due to its lack of medical staff and lockdown status related to the pandemic.

Mr. Byrd's medical records submitted to the courts below clearly establish, therefore, that Mr. Byrd has suffered, and continues to suffer while incarcerated at the FCI McDowell facility, from serious underlying medical conditions, including, among others, lung and breathing issues, skin issues, and kidney issues.

Mr. Byrd has further advised that his obesity has worsened due to lockdown conditions at the FCI McDowell facility and that he currently weighs 276 pounds. In addition, he has advised that he is currently on a slew of prescription medications to treat his lung, kidney, and other health issues, including Albuterol, Asmanex twist inhalers, Lasix, Atorvastatin, Celexa, and Buspirone.

Accordingly, due to Mr. Byrd's lung-related issues, kidney issues, and obesity, he is in a high-risk category for severe illness or death should he contract the COVID-19 virus. *See, e.g., United States v. Toma*, 2021 U.S. Dist. LEXIS 112802, at *13 (N.D. Ill. 2021) (noting that "obesity and asthma constitute 'extraordinary and compelling' reasons justifying . . . early release").

II. Mr. Byrd's Risk of Contracting COVID-19 Is Heightened While He Remains Incarcerated.

According to the BOP website, federal prison facilities have been assigned "modified operational levels" "based on the facilities' COVID-19 medical isolation rate, combined percentage of staff and inmate completed vaccinations series, and their respective county transmission rates." *See* "COVID-19 Coronavirus", *available at* <https://www.bop.gov/coronavirus/>. These levels range from green (minimal modifications) to red (intense modifications), and FCI McDowell is currently in the red category, indicating a high risk of COVID-19 transmission within that facility. *Id.*

In addition, the Centers for Disease Control ("CDC") and other public health officials have specifically warned that COVID-19 is spreading rapid in prison facilities, due to the population density, use of shared living, eating, and bathroom

facilities, and other factors. The CDC issued a report dated March 23, 2020, which was submitted to the courts below as an exhibit to Mr. Byrd's Second Motion for Compassionate Release, which discusses the "heightened potential" for the virus to spread amongst prisoners.

Similar concerns are addressed in the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 12003(b)(2), 134 Stat. 281, 516 (2020) ("CARES Act"), which was signed into law on March 27, 2020 in response to the pandemic. This Act authorizes the BOP to lengthen the maximum amount of time that a prisoner may be placed in home confinement if the Attorney General finds that emergency conditions will affect the functioning of the BOP.

On March 26, 2020, the Attorney General of the United States issued a memorandum, to the BOP directing that inmates should be transferred to home confinement where appropriate to help reduce the risk of their contracting COVID-19.

Federal courts throughout the country have also recognized the risk posed to federal inmates by the COVID-19 pandemic. *See, e.g., Basank v. Decker*, 2020 U. S. Dist. LEXIS 53191, at *9 (S.D.N.Y. 2020) (holding that the petitioners had established the threat of irreparable harm of infection if they remain in immigration detention because the nature of detention facilities made exposure and spread of COVID-19 particularly harmful); *Segars v. United States*, 2020 U.S. Dist. LEXIS 103807 (E.D. Mich. 2020) (granting the defendant's application for compassionate release because although his "crimes were serious, but the quality of his time in

prison has shown that he has the educational and correctional tools to live a life apart from crime. Finally, the potential danger of [the defendant's] medical conditions outweigh any marginal benefit he would receive from finishing his remaining time in prison.”); *United States v. Agomuoh*, 2020 U.S. Dist. LEXIS 86562 (E.D. Mich. 2020) (granting the defendant's application for compassionate release, due to his underlying medical conditions and the serious risks posed by COVID-19 within federal prisons, even though there were not yet any reported cases of COVID-19 among inmates at the defendant's facility); *United States v. Colvin*, 2020 U.S. Dist. LEXIS 57962 (D. Conn. 2020) (finding that the defendant's underlying health condition and the COVID-19 pandemic constitute extraordinary and compelling reasons that may justify compassionate release); *United States v. Rodriguez*, 2020 U.S. LEXIS 58718 (E.D. Pa. 2020) (granting the defendant's application for sentence reduction due to the possible implications of the underlying health condition and COVID-19); *United States v. Roman*, 2020 U.S. Dist. LEXIS 53956 (S.D.N.Y. 2020) (granting the defendant's application for release pending sentencing due to heightened risk of exposure to COVID-19 because of defendant's advanced age and underlying health condition); *United States v. Medlin*, 2020 U.S. Dist. LEXIS 130803, at *21 (M.D. Tenn. 2020) (“... the Court is willing to accept that Defendant is at a higher risk of infection in BOP custody than he would be if released. . .”); *United States v. McConico*, Docket No. 15-20267 (E.D. Mich. July 31, 2020) (noting, “The pandemic has put unparalleled stress on the Bureau of Prisons and provided extraordinary and compelling reasons to release individuals.” and granting the defendant's motion for compassionate

release where, among other factors, the defendant's offenses had resulted primarily from his heroin addiction and he has since maintained his sobriety, and the defendant's underlying medical conditions put him at particular risk for serious complications from COVID-19).

In several of these decisions, courts have expressed concern over the particularly high risks posed by the COVID-19 pandemic within federal prison facilities. *See, e.g., United States v. Bolling*, 2020 U.S. Dist. LEXIS 82564, at *10 (D. Md. 2020) (“Prisons, jails, and detention centers are especially vulnerable to outbreaks of COVID-19. . . . [O]nce the Coronavirus is introduced into a detention facility, the nature of these facilities makes the mitigation measures introduced elsewhere in the country difficult or impossible to implement. Detention facilities often lack personal protective equipment that helps prevent the transmission of the virus. Shared facilities, such as bathrooms, dining halls, and telephones, are often not disinfected between uses. Poor ventilation increases the risk of transmission. Detained individuals are often not given the opportunity or tools to wash or sanitize their hands frequently. And the crowded nature of the facilities can make social distancing recommended by the CDC impossible.”), quoting *Coreas v. Bounds*, 2020 U.S. Dist. LEXIS 59211 (D. Md. 2020).

The Southern District of West Virginia has itself noted, “many courts have found ‘extraordinary and compelling’ reasons ‘supporting release on the basis of a combination of dire prison conditions and underlying health conditions that increase

the likelihood of severe illness from COVID-19.” *United States v. Owens*, 2020 U.S. Dist. LEXIS 169986, at *5 (S.D. W.V. 2020).

The court further recognized, “the unprecedented magnitude of the COVID-19 pandemic and the extremely serious health risks that it presents for all of us, including, and perhaps especially, those individuals’ who are ‘presently detained in federal custody.” *United States v. Carter*, 2020 U.S. Dist. LEXIS 111541, *13 (S.D. W.V. 2020), quoting *United States v. Wiggins*, 2020 U.S. Dist. LEXIS 64941 (D. D.C. 2020).

These materials indicate that the federal government and federal courts have acknowledged the increased risks presented by COVID-19 within federal prison facilities and have suggested that early release to home confinement may be an appropriate means of limiting this risk.

The CDC and other public health organizations have further cautioned that the COVID-19 virus can be especially dangerous for individuals with underlying medical conditions and has classified individuals with, among other conditions, chronic lung disease, kidney problems, and obesity, all of which Mr. Byrd suffers from, as being at “high risk”.

Because these high-risk individuals may experience more severe forms of the virus, which could potentially become fatal, they are advised to “stay home as much as possible” and otherwise limit interaction with anyone who may be carrying the virus. *Id.* This is, obviously, very difficult, if not impossible, to do within the confines of a federal prison facility.

In the time since Mr. Byrd's appeal was filed with the Fourth Circuit, the situation has worsened with the emergence of the so-called "Delta Variant" of COVID-19. The CDC has advised that the Delta Variant is "highly contagious, more than 2x as contagious as previous variants" and "might cause more severe illness than previous strains in unvaccinated persons". See "Delta Variant: What We Know About the Science", *available at* <https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html>.

Mr. Byrd submitted a pro se Motion for Judicial Notice to the Fourth Circuit on August 6, 2021 requesting that the Fourth Circuit take judicial notice of the dangers posed by the Delta Variant, but as of the filing of this Petition, the Fourth Circuit has failed to address that motion, just as it has failed to address his pending appeal or Motion to Expedite that appeal. A21-22.

Mr. Byrd has advised that the FCI McDowell facility has remained on "lockdown" as a result of the spread of this variant, with all visitation currently prohibited, and no access to exercise or necessary medical care.

Accordingly, not only is Mr. Byrd in a high-risk category for severe illness, or even death, from COVID-19, but he is in a very high-risk environment for contracting COVID-19. These risks, especially when taken together, illustrate the emergent nature of Mr. Byrd's appeal of his Second Motion for Compassionate Release.

III. In Light of the Life-Threatening Health Risks Posed to Mr. Byrd Through Continued Incarceration, the Fourth Circuit Has Abused Its Discretion in Failing to Render a Timely Decision as to Mr. Byrd's Appeal or Motion to Expedite, Warranting a Writ of Mandamus.

This Court has long recognized that it has authority, in the exercise of its appellate jurisdiction, to issue a writ of mandamus to, among other things, “compel the Circuit Court to proceed to a final judgment or decree in a cause”. *Comstock*, 83 U.S. at 270; *see also* 28 U.S.C. § 1651(a) (“The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”).

As noted above, “The writ [of a mandamus] is appropriately issued, however, when there is ‘usurpation of judicial power’ or a clear abuse of discretion.” *Holder*, 379 U.S. at 110.

This Court has held on at least one occasion that it may constitute an abuse of discretion where a circuit court fails to timely issue a judgment. *See, e.g., Ryan v. Schad*, 570 U.S. 521 (2013) (holding that the Ninth Circuit abused its discretion in failing to timely issue a mandate).

We submit that in this matter, the Fourth Circuit’s delay in rendering a decision as to Petitioner’s appeal of his Second Motion for Compassionate Release constitutes an abuse of discretion, in light of the very serious, and potentially life-threatening, health risks posed to Petitioner due to his underlying medical conditions and the ongoing COVID-19 pandemic.

Petitioner has attempted to resolve this with the Fourth Circuit through the filing of a Motion to Expedite and a pro se Motion for Judicial Notice requesting that the court take judicial notice of the dangers posed by the recent emergence of the Delta Variant of COVID-19, but the Fourth Circuit has failed to address either of those motions as well.

Accordingly, Petitioner is left with no recourse but to petition this Court for a writ of mandamus directing the Fourth Circuit to render a decision as to his pending appeal. For each day that Petitioner remains incarcerated at the FCI McDowell facility, he risks contracting the COVID-19 virus, which could result in several complications or even death.

We, therefore, respectfully request that this Court issue a writ of mandamus ordering the Fourth Circuit to render a decision as to Petitioner's pending appeal.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Court grant this Petition for a Writ of Mandamus.

DATED: 25 August, 2021

Respectfully submitted,

/s/ Patrick A. Mullin

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