

No. 23-**22-7261**

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

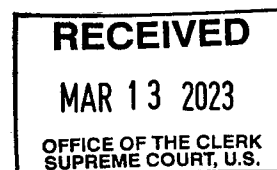
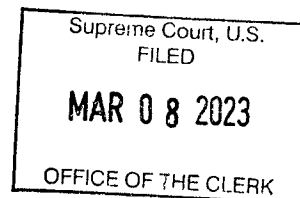
SUSAN ELISE PROPHET,

Petitioner-Appellant.

*On Petition for a Writ of Certiorari to the United States
Court of Appeals For The Eighth Circuit*

PETITION FOR A WRIT OF CERTIORARI

SUSAN ELISE PROPHET
REG. No. 26698-045
FCI WASECA
FEDERAL CORR. INSTITUTION
P.O. BOX 1731
WASECA, MN 56093
APPEARING *PRO SE*



QUESTIONS PRESENTED

- I. Whether the United States Court of Appeals for the Eighth Circuit abused its discretion in denying Prophet's Motion for Compassionate Release/Reduction in Sentence Pursuant to 18 U.S.C. § 3582(c)(1)A(i).

PARTIES TO THE PROCEEDINGS

Petitioner-Appellant, SUSAN ELISE PROPHET (“Prophet”), was a criminal defendant in the United States District Court for the Western District of Missouri, Western Division, in USDC Criminal No. 4:14-cr-00047-DGK-1; and as Appellant in the United States Court of Appeals for the Eighth Circuit (“Eighth Circuit”) in USCA No. 22-3487. Respondent, United States of America, was the Plaintiff in the District Court and Appellee in the Eighth Circuit.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	iii
APPENDIX TABLE OF CONTENTS.....	iv
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI	1
OPINION BELOW.....	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED ..	1-2
STATEMENT OF THE CASE	2
A. The Proceedings Below	2
B. Statement of the Facts	4
REASONS FOR GRANTING THE WRIT	7
The United States Court of Appeals for the Eighth Circuit abused its discretion in denying Prophet’s Motion for Compassionate Release/Reduction in Sentence Pursuant to 18 U.S.C. § 3582(c)(1)A)(i).	7
CONCLUSION.....	21

APPENDIX TABLE OF CONTENTS

Page

Eighth Circuit's Judgment in USCA No. 22-3487 Dated December 8, 2022, Denying Prophet's Appeal for Compassionate Release	1A
---	----

TABLE OF AUTHORITIES

Cases	Page
<i>Dillon</i> , 130 S.Ct. at 2692	17
<i>Dominguez v. Corr. Med. Servs.</i> , 555 F.3d 543, 550 (6 th Cir. 2009).....	20
<i>Esparza</i> , 2020 WL 1536155, at *3 (citing U.S.S.G. §1B1.13).....	17
<i>Estelle v. Gamble</i> , 429 U.S. 97, 106 (1976).....	7
<i>Haines v. Kerner</i> , 404 U.S. 519, 520 (1972)	7
<i>Helling</i> , 509 U.S. at 33, 36.....	20
<i>Hutto v. Finney</i> , 437 U.S. 678, 682-685 (1978).	20
<i>Santiago v. Ringle</i> , 734 F.3d 585, 591 (6 th Cir.2013). .	20
<i>United States v. Armstrong</i> , 2020 WL 4366015, at *1 (S.D. Cal. July 30, 2020)	19
<i>United States v. Booker</i> , 543 U.S. 220, 227 (2005).20,	19
<i>United States v. Eck</i> , 2020 WL 7390516, at *2 (D.S.D. Dec. 16, 2020)	18
<i>United States v. Garcia</i> , 2020 WL 3547933, at *1 (D. Haw. June 30, 2020)	18
<i>United States v. Greenhow</i> , 2020 WL 7384721, at *1 (D.N.J. Dec. 16, 2020).	18

<i>USA v. Susan Elise Prophet</i> , No.22-3487 (8 th Cir. 2022)	1
<i>United States v. Marcussen</i> , 15 F.4 th 855, 858 (8 th Cir. 2021).	8
<i>United States v. Marty</i> , 2020 WL 7425338, at *1 (E.D. Cal. Dec. 18, 2020).	17
<i>United States v. Parker</i> , No. 2:98-CR-00749-CAS-1, 2020 WL 2572525, at *11 (C.D. Cal. May 21, 2020). ..	20
<i>United States v. Prophet</i> , 825 F.3d 904 (8 th Cir. 2016).....	6
<i>Villegas v. Metro. Govt. of Nashville</i> , 709 F.3d 563, 568 (6 th Cir. 2013)	20

Statutes, Rules and Regulations

	Page
18 U.S.C. § 2.....	2
18 U.S.C. § 1028A	2
18 U.S.C. § 1344	2
18 U.S.C. § 1343	2
18 U.S.C. §1957	2
U.S.C. § 3142(g)(4)	9
18 U.S.C. § 3553	17
18 U.S.C. § 3553(a)	8-9, 17, 20

18 U.S.C. § 3582(c)(1)(A)	7-8, 17
18 U.S.C. § 3582(c)(1)(A)(i)	i, 7
18 U.S.C. § 3582(c)(2)	17, 20
21 U.S.C. § 853(p)	2
28 U.S.C. § 1254(1)	1
28 U.S.C. § 2254	1
28 U.S.C. § 2255	3, 6, 7
USSG § 2B1.1	5
U.S.S.G. § 1B1.11(a)	5
U.S.S.G. § 1B1.13	17
USSG § 2B1.1(b)(10)	5
USSG § 2B1.1(b)(1)(H)	5
USSG § 3B1.3	5
USSG § 3E1.1	5
USSG §§ 3E1.1(a)	5
USSG §§ 3E1.1(b)	5
Rule 47A(a)	9-10

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The Judgment of the Eighth Circuit in *USA v. Susan Elise Prophet*, No. 22-3487 (8th Cir. 2022), denying Prophet's Motion for Compassionate Release, is attached in the Appendix at 1A.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on December 8, 2022. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254, in its pertinent part, provides:

“(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.”

STATEMENT OF THE CASE

A. The Proceedings Below

On February 25, 2014, a grand jury sitting in the United States District Court for the Western District of Missouri, Western Division, returned a sixteen (16) Count Indictment charging Prophet. See Doc. 1.¹ Counts 1 and 2 charged Prophet with Bank Fraud, in violation of 18 U.S.C. § 1344. *Id.* Count 3 charged Prophet with Wire Fraud, in violation of 18 U.S.C. §§ 1343 and 2. *Id.* Count 4 charged Prophet with Money Laundering, in violation of 18 U.S.C. §§ 1957 and 2. *Id.* Count 5 through 16 charged Prophet with Aggravated Identity Theft, in violation of 18 U.S.C. §§ 1028A and 2. *Id.* The Indictment also contained a Forfeiture Allegation, pursuant to 21 U.S.C. § 853(p). *Id.*

On August 13, 2014, a Change of Plea Hearing was held and Prophet entered a plea of guilty as to Counts 1 and 5 of the Indictment, pursuant to a written Plea Agreement. See Docs. 25, 26.

On June 30, 2015, Prophet was sentenced to a total term of 240 months’ imprisonment, 5 years Supervised

1

“Doc.” refers to the Docket Report in the United States District Court for the Western District of Missouri, Western Division, in Criminal No. 4:14-cr-00047-DGK-1, which is followed by the Docket Entry Number.

Release, \$668,889.88 Restitution, and a Mandatory Special Assessment Fee of \$200. See Docs. 34, 35.

On July 13, 2015, Prophet timely filed a Notice of Appeal. See Doc. 38.

On June 14, 2016, the United States Court of Appeals for the Eighth Circuit (“Eighth Circuit”) issued an Order dismissing Prophet’s appeal. See Doc. 53.

On July 18, 2016, Prophet filed a Motion under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody (“§ 2255 Motion”), which was denied on October 20, 2016. See Docs. 55, 57.

September 28, 2020, Prophet filed a Motion for Sentence Reduction (Compassionate Release), which was denied on January 4, 2020, See Docs. 66, 73.

On September 20, 2021, Prophet filed a Second Motion for Compassionate Release, which was denied on January 20, 2022. See Docs. 77, 84.

On January 31, 2022, Prophet filed a Notice of Appeal re: denial of her Second Motion for Compassionate Release, which the Eighth Circuit affirmed the District Court’s judgment on February 22, 2022. See Docs. 87, 90, 92.

On July 8, 2022, Prophet filed a *pro se* Motion for Compassionate Release, which was again, denied on November 21, 2022. See Docs. 93, 98.

On November 30, 2022, Prophet appealed the denial of her Motion for Sentence Reduction (Compassionate Release), which, again, the Eighth Circuit denied her motion. See Docs. 99, 103, 105.

B. Statement of the Facts**1. Offense Conduct**

The United States and Prophet, through the advise of her counsel, agreed to the following facts constituting the offense to which she plead guilty for:

From December 16, 2012 to August 6, 2013 as the bookkeeper of Dorfman Plumbing Supply Company (“DPSC”) in Kansas City, in the Western District of Missouri, Susan E. Prophet embezzled \$543,034.26 by forging her employer, Charles Dorfman’s, signature on 104 checks, 99 of which were written to herself. Prophet endorsed the checks with the names “Susan Morriss,” “Susan Prophet” and “Susan Prophett.” The checks were drawn on DPSC’s business account held at UMB Bank held in Kansas City, Missouri. She deposited the checks into three of her accounts, some of which were opened with her name misspelled slightly or with other false information.

See Doc. 26 at 2-4; PSR ¶¶ 4-11.²

2. Plea Proceeding

On August 13, 201, a Change of Plea Hearing was held before Chief District Judge Greg Kays. See Doc. 25. Prophet entered a plea of guilty as to Counts 1 and 5 of the Indictment, pursuant to a written Plea Agreement. See Doc. 26. In exchange for Prophet’s guilty plea, the government agreed: (1) not to bring any additional charges against

²“PSR” refers to the Presentence Report in this case, which is immediately followed by the paragraph (“¶”) number.

defendant for any federal criminal offenses related to bank fraud, wire fraud, theft from a government program, identity theft, money laundering and firearms, for which it has venue and which arose out of or in connection with the Prophet's conduct; and (2) dismiss Counts 2 through 4 and 6 through 16 of the Indictment, at sentencing. *Id.* at 14. The case was referred to the U.S. Probation Office for the preparation of the PSR.

3. Presentence Report Calculations and Recommendations

On March 24, 2015, the Probation Office prepared Prophet's PSR, which was revised on May 4, 2015. The 2014 Guidelines Manual was used to determine Prophet's offense level, pursuant to § 1B1.1(a). See PSR ¶ 17. Count 1: Bank Fraud, calls for a Base Offense Level of 7, pursuant to USSG § 2B1.1. See PSR ¶ 19. Fourteen (14) levels were added because the loss from the offense was greater than \$400,000 and less than \$1,000,000, pursuant to USSG § 2B1.1(b)(1)(H). See PSR ¶ 20. Two (2) levels were added because the offense involved sophisticated means which included multiple bank accounts, falsifying documents, and forging signatures, pursuant to USSG § 2B1.1(b)(10). See PSR ¶ 21. Another two (2) levels were added because Prophet abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense; therefore, increase by two levels, pursuant to USSG § 3B1.3. See PSR ¶ 23. Prophet received a three (3) level reduction for acceptance of responsibility, pursuant to USSG §§ 3E1.1(a) and (b). See PSR ¶¶ 27-28. The PSR calculated Prophet's Total Offense Level to be level 22. See PSR ¶ 29. Prophet's total criminal history score of 10, placed her in Criminal History Category V. See PSR ¶ 41. Based upon a Total Offense Level 22 and a Criminal History Category of V, the guideline imprisonment range

was 77 to 96 months. See PSR ¶ 69. The term of 24 months imprisonment on Count 5, must be imposed consecutively to Count 1. See PSR ¶ 68.

4. Sentencing Proceeding

On June 30, 2015, a Sentencing Hearing was held before Chief District Judge Greg Kays. See Doc. 34. At sentencing, the Court sentenced Prophet to a term of 216 months on Count 1 and 24 months on Count 5, for a total term of 240 months' imprisonment; followed by supervised release for a term of 5 years on Count 1 and 1 year on Count 5, to be served concurrently; and ordered payment of MPA of \$668,889.88 Restitution and a Mandatory Special Assessment Fee of \$200. See Doc. 35. Counts 2, 3, 4, 6-16 were dismissed on the motion of the United States. *Id.* A timely Notice of Appeal was filed on July 13, 2015. See Doc. 38.

5. Appellate Proceeding

On Appeal, Prophet argues that the District Court erred procedurally and that the sentences were substantively unreasonable. On June 14, 2016, the Eighth Circuit enforced the appeal waiver in the Plea Agreement and dismissed Prophet's appeal. See Doc. 53; *United States v. Prophet*, 825 F.3d 904 (8th Cir. 2016).

6. Postconviction Proceeding

July 18, 2016, Prophet filed a § 2255 Motion, arguing the following grounds for relief: (1) defense counsel was ineffective for failing to provide Movant with sufficient information and advice regarding her case, coercing her into pleading guilty, and failing to take certain actions at sentencing; (2) the prosecutor committed misconduct by holding a bias against Movant and threatening Movant that, if she did not sign the plea

agreement, he would seek charges in Kansas, add charges in Missouri, and “go after [her] family;” and (3) this Court was biased against Movant. Doc. 55. On April 20, 2017, the United States files Suggestions in opposition to Prophet’s § 2255 Motion, arguing that Ground 1 is without merit and that Grounds 2 and 3 are procedurally barred and, alternatively, are without merit. In reply, Prophet argues that she had telephone conversations with defense counsel while she was housed at Leavenworth Detention Center which were recorded and will support her claims regarding counsel’s deficient performance. On October 20, 2016, upon review of the record, the District Court denied Prophet’s § 2255 Motion and denied to issue a certificate of appealability. See Doc. 57.

REASONS FOR GRANTING THE WRIT

As a preliminary matter, Prophet respectfully requests that this Honorable Court be mindful that *pro se* litigants are entitled to liberal construction of their pleadings. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); and *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

The United States Court of Appeals for the Eighth Circuit Abused its Discretion in Denying Prophet’s Motion for Compassionate Release/Reduction in Sentence Pursuant to 18 U.S.C. § 3582(c)(1)(A)(i).

Prophet contends that the Eighth Circuit abused its discretion when it denied his Motion for Compassionate Release Under 18 U.S.C. § 3582(c)(1)(A) and Notice of Appeal, for the following facts and reasons:

The Eighth Circuit’s Judgment dated December 8, 2022, denying Prophet’s Notice of Appeal reads:

The original file of the United States District Court denied Prophet's Fourth Compassionate Release Motion which states as:

This is Prophet's fourth motion for compassionate release, and it largely repeats the arguments the Court previously rejected in denying her other requests. See Doc. 93. After the Court denied her last request, she appealed to the Eighth Circuit. That court affirmed. Like her previous requests, Prophet has again failed to establish any extraordinary and compelling reason that justifies relief. See 18 U.S.C. § 3582(c)(1)(A). Prophet argues that the COVID-19 pandemic along with her asthma and rhinitis present compelling and extraordinary reasons warranting release. This is not the case. The COVID-19 pandemic does not constitute an extraordinary and compelling reason for relief. *United States v. Marcussen*, 15 F.4th 855, 858 (8th Cir. 2021). And Prophet's ailments coupled with the pandemic do not meet this standard either. Prophet has been seen for her ailments on several occasions, but her medical records show that her ailments have not rendered her unable to care for herself and appear to be treated effectively with medication and inhalers. See generally *id.* Moreover, Prophet has been vaccinated against COVID-19. In addition to the lack of compelling circumstances, consideration of the factors under 18 U.S.C. § 3553(a)

strongly favors denying the motion. The Court's weighing of the factors is essentially the same as when it sentenced Prophet. She pled guilty to bank fraud and aggravated identity theft for a sophisticated embezzlement scheme that she used to steal hundreds of thousands of dollars from several small businesses. Prophet had a Category V Criminal History, and she committed the offenses for which she is now imprisoned while on parole for other, similar offenses. While Prophet has taken classes in prison and purports to have a release plan, the remaining facts and factors support denial of the motion and suggest Prophet would continue to be a danger to the community if released. See 18 U.S.C. § 3553(a); see also 18 U.S.C. § 3142(g)(4).

The District Court, therefore DENIED after complete review of the motion on the merits.

In sum, this Court has reviewed the abovementioned file of the United States District Court. Following a Judgment based on Eighth Circuit Rule 47A(a), whereas:

RULE 47A: SUMMARY DISPOSITION

(a) On Motion of Court. The court on its own motion may summarily dispose of any appeal without notice. However, in an in forma pauperis appeal in which a certificate of

appealability has been issued, the court will afford 14 days' notice before entering summary disposition if the briefs have not been filed.

The court will dismiss the appeal if it is not within the court's jurisdiction or is frivolous and entirely without merit. The court may affirm or reverse when the questions presented do not require further consideration.

The court in its discretion, with or without further explanation, may enter either of the following orders: "AFFIRMED. See 8th Cir. R. 47A(a)"; or "ENFORCED. See 8th Cir. R. 47A(a)."

See Appendix at 1A.

The Eighth Circuit agreed with the District Court that Prophet's appeal presents no substantial question. Accordingly, the Eighth Circuit summarily affirmed the judgment of the District Court. See Doc. 90.

1. "Extraordinary and Compelling"
Circumstances Warranting Relief

Prophet's Vulnerability to COVID-19 Due to his High Medical Risk Is an Extraordinary and Compelling Reason That Warrants a Sentence Reduction.

Prophet, age 54, suffers from incurable, progressive disease, from which she will never recover, to wit: Asthma.

She also suffers from chronic dyspnea (shortness of breath). See Exhibit 1.

Facts:

Asthma. It is a disease that affects your lungs. It is one of the most common long-term diseases of children, but adults can have asthma, too. Asthma causes wheezing, breathlessness, chest tightness, and coughing at night or early in the morning. If you have asthma, you have it all the time, but you will have asthma attacks only when something bothers your lungs. We don't know all the things that can cause asthma, but we do know that genetic, environmental, and occupational factors have been linked to developing asthma.

Being exposed to things in the environment, like mold or dampness, some allergens such as dust mites, and secondhand tobacco smoke have been linked to developing asthma. Air pollution and viral lung infection may also lead to asthma.

An asthma attack may include coughing, chest tightness, wheezing, and trouble breathing. The attack happens in your body's airways, which are the paths that carry air to your lungs. As the air moves through your lungs, the airways become smaller, like the branches of a tree are smaller than the tree trunk. During an asthma attack, the sides of the airways in your lungs swell and the airways shrink. Less air gets in and out of your lungs, and mucous that your body makes clogs up the airways.

Dyspnea is defined by the American Thoracic Society as the “subjective experience of breathing discomfort.” While previous definitions have sometimes merged this true symptom with physical signs (e.g. “exhibits labored breathing”), the American Thoracic Society considers dyspnea as a symptom. Thus dyspnea can only be described by the person who experiences it. Most awake patients can give a meaningful rating of the severity of their dyspnea, as with the familiar ratings of pain. We believe that dyspnea assessment ought to be as routine as pain assessment, i.e., dyspnea should be the “6th vital sign”, as previously suggested. Physical signs are notoriously unreliable in assessing a patient’s dyspnea or pain and should only be used when patients are unable to report what they feel.

Dyspnea is widely prevalent in patients with advanced disease and is about as common a symptom as pain. Among those suffering with dyspnea, many will adjust their activities of daily living to avoid the discomfort. Dyspnea is a complex symptom with multiple causes and presents a significant challenge for the provider. While preferred therapeutic approaches are directed at correcting the underlying pathophysiology, this is often not practical or possible, and non-specific palliative approaches are required.

COVID-19. COVID-19 is the disease caused by the new coronavirus that emerged in China in December 2019. COVID-19 symptoms include cough, fever or chills, shortness of breath or difficulty breathing, muscle or body

aches, sore throat, new loss of taste or smell, diarrhea, headache, new fatigue, nausea or vomiting and congestion or runny nose. COVID-19 can be severe, and some cases have caused death.

COVID-19 Vaccines' Effectivity

According to Centers for Disease Control and Prevention ("CDC");

1. COVID-19 vaccines are safe and effective.
2. COVID-19 vaccination helps protect adults and children ages 6 months and older from getting severely ill with COVID-19 and helps protect those around them.
3. **Some people who are vaccinated against COVID-19 will still get sick and have a vaccine breakthrough infection because no vaccine is 100% effective.**

COVID-19 vaccines help protect against severe illness, hospitalization and death. COVID-19 vaccines also help protect against infection. **People who are vaccinated may still get COVID-19.** When people who have been vaccinated get COVID-19, they are much less likely to experience severe symptoms than people who are unvaccinated.

People who get vaccine breakthrough infections can spread COVID-19 to other people. When a community reports more COVID-19 infections, that means more virus is circulating. When more virus is circulating, more breakthrough infections will occur even when vaccination rates are high. Even if you

are vaccinated, if you live in a county with a high COVID-19 Community Level, you and others in your community, whether vaccinated or not, should take more steps to protect yourself and others, like wearing a mask in indoor public places.

CDC monitors reported vaccine breakthrough infections to better understand patterns of COVID-19 among people who are vaccinated and unvaccinated.

<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/effectiveness/index.html>

<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/effectiveness/why-measure-effectiveness/breakthrough-cases.html>

As mentioned above, the vaccine is safe and effective however, there was no guarantee, whether or not, Prophet gets vaccinated, that she would not acquire the virus that is greatly harmful for her condition and she could even spread it out to others. Because it does not make her 100% immune from COVID-19, as well as, the proper hygiene could not be monitored at all times, and considering the prison's population, her exposure to the virus is still at greater chance compared to being confined at home. In opposition to the District Court's claim that she had been responding well to the medications (Advair and Singulair), it was noted that despite Prophet taking them regularly, there was no any noticeably lasting benefit from such and continues to suffer from shortness of breath. See Exhibit 1. In fact, she had been placed on medication trial (Prednisone), which resulted the same. *Id.* For these reasons, clearly, Prophet's health is at major risk.

Due to overcrowding, lack of resources, and little access to medical care, incarcerated people have been at high risk for contracting COVID-19. Now, as the highly transmissible Delta variant circulates widely, they may be even more susceptible to the virus.

Josh Manson, a researcher at the UCLA Law COVID Behind Bars Data Project, tells Verywell that there have been few efforts to curb the Delta variant and COVID-19 overall, making prisons deadly places for transmission. “When the pandemic first hit in March 2020, prisons were not taking the situation seriously,” Manson says. “We know that it’s even more transmissible than it was the first time a year and a half ago. We’ve seen thousands of people die in jails and prisons.”

Factually, the District Court does not deny Prophet’s suffering from any of the health conditions she identifies. More so, Prophet’s enumerated diagnosed medical conditions are chronic health conditions that “technically involve an increased risk of severe illness from COVID-19, as set forth by the Centers for Disease Control.” “People with asthma. . . chronic lung disease.” See CDC, People Who are at Increased Risk for Severe Illness, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-increased-risk.html> (last updated January 26, 2023) (last accessed March 8, 2023).

Due to overcrowding, lack of resources, and little access to medical care, incarcerated people have been at high risk for contracting COVID-19. Now, as the highly transmissible Delta variant circulates widely, they may be even more susceptible to the virus.

Josh Manson, a researcher at the UCLA Law COVID Behind Bars Data Project, tells Verywell that there have been few efforts to curb the Delta variant and COVID-19 overall, making prisons deadly places for

transmission. “When the pandemic first hit in March 2020, prisons were not taking the situation seriously,” Manson says. “We know that it’s even more transmissible than it was the first time a year and a half ago. We’ve seen thousands of people die in jails and prisons.”

Hence, it is appropriate for Prophet to be released into an environment where he and his loved ones can control and direct his medical care. It is important for all of us to remember that convicted criminals are sent to prison as punishment—not for punishment. People who are severely debilitated or are in the midst of dying are usually no longer a threat to society, and there is not a compelling social advantage to keeping them in prison. Given the highly infectious nature of COVID-19, the inability in a facility like FCI to practice any of the hygienic and social distancing techniques that the Center for Disease Control has put in place to prevent rapid transmission, and the fact that Prophet suffers from ailments that have already been identified as “high risk,” this Court should find that Prophet’ legitimate medical risk is a sufficiently extraordinary and compelling basis for granting compassionate release.

Finally, in the last few months, other jails and prisons have already started to proactively release elderly and sick inmates who are at high risk of infection, as well as releasing as many nonviolent offenders as possible in an effort to reduce the incarcerated population and thus reduce the risk of spread. For example, on March 25, 2020, New York City announced that it would release 300 inmates from Rikers Island. Approximately 1,700 inmates have been released from Los Angeles County Jails, and 1,000 inmates are to be released from New Jersey jails. Therefore, while COVID-19 remains an unprecedented emergency, many states (and politicians) have recognized that they have a duty to flatten the curve inside incarcerated spaces. So, too, should this Court.

Additionally, this Court should find this suffices to show an “extraordinary and compelling reason” to grant defendant compassionate release.

2. Applicable Factors Under 18 U.S.C. § 3553

The district court is required to consider any applicable factors under 18 U.S.C. § 3553 in deciding whether a sentence modification is “warranted in whole or in part under the particular circumstances of the case.” *Dillon*, 130 S.Ct. at 2692. “Because reference to § 3553 is appropriate only at the second step of this circumscribed inquiry, it cannot serve to transform the proceedings under § 3582(c)(2) into preliminary re-sentencing proceedings.” *Id.* Thus, even if Prophet qualifies for sentence modification under the first step of the analysis, the decision whether to ultimately grant a modification is left to the sound discretion of the trial court. See *Dillon*, 130 S.Ct. at 2692.

The Sentencing Guidelines instruct “the court should consider the sentencing factors set forth in 18 U.S.C. § 3553(a) when deciding a motion for compassionate release, and the [c]ourt should not grant a sentence reduction if the defendant poses a risk of danger to the community, as defined in the Bail Reform Act.” *Esparza*, 2020 WL 1536155, at *3 (citing U.S.S.G. § 1B1.13); see also 18 U.S.C. § 3582(c)(1)(A).

3. Courts Have Granted Compassionate Release in Light of the Instant Pandemic.

Prophet urges the Court to consider the following compassionate release grants:

- United States v. Marty, 2020 WL 7425338, at *1 (E.D. Cal. Dec. 18, 2020)
 - 120 months for tax fraud

- Obesity, asthma, in her 60s, former smoker
- FCI Dublin
- Release date is December 2025 (served 35%)

■ *United States v. Eck*, 2020 WL 7390516, at *2 (D.S.D. Dec. 16, 2020)

- FCI Mendota
- Sentenced to 108 months for meth, reduced to 48 months, served 40% and has 2 years left
- Type 2 diabetes, hyperlipidemia, hypertension, rhinitis, asthma
- Worsening diabetes and neuropathy

■ *United States v. Greenhow*, 2020 WL 7384721, at *1 (D.N.J. Dec. 16, 2020)

- 120 months for heroin, two years left
- FCI Allenwood
- 46 years old, obesity, asthma

■ *United States v. Garcia*, 2020 WL 3547933, at *1 (D. Haw. June 30, 2020)

- Defendant is 66 years old and has only 18 months left to serve on his 120-month sentence. Defendant's medical records indicate that he has a history of medical conditions related to his heart, lungs, and back. The records indicate Defendant had at least one previous heart attack and continues to suffer from hypertension and congestive heart failure. Defendant is currently diagnosed with chronic

obstructive pulmonary disease (COPD), chronic obstructive asthma, and suffers from shortness of breath. The records indicate Defendant has pinched nerves and slipped discs in his back that require him to utilize a walker. On June 26, 2020, Defendant suffered another heart attack while incarcerated

■ United States v. Armstrong, 2020 WL 4366015, at *1 (S.D. Cal. July 30, 2020)

- BASHANT
- Terminal Island, sentenced to 46 months in 2018 for large quantity of meth
- 54 years old, high blood pressure, high cholesterol, type 2 diabetes, obesity
- Tested positive for COVID, listed as recovered on May 10, 2020, but has filed declaration saying he still has shortness of breath; D also argues reinfection risks
- Cites Adrian Solarzano's death, which "makes it clear that simply announcing that an inmate has "recovered" does not mean that Mr. Armstrong is completely safe from the virus"
- "Finally, the Court is aware that defendants committing similar offenses now, in the time of COVID-19, are receiving vastly lower sentencing recommendations, because their time in custody is harsher."

•

Next, Prophet argues that a reduction of sentence is warranted to avoid unwanted sentencing disparities, taking into consideration case-specific circumstances related to Prophet's character, and in light of her post-sentencing rehabilitation. Prophet contends that leaving her current sentence in place creates disparity between Prophet and similarly situated defendants— who were involved in a conspiracy and involved more victims and substantially greater amount of loss than her. Prophet received a sentence more than double of what the plea agreement indicated. See Doc. 26. More so, at sentencing, the government “agreed to recommend the low end of Prophet’s guideline range, and we stand by that agreement, which would be a sentence of 101 months.” See Doc. 46 at 14. In addition to the need to avoid unwarranted sentence disparities, Prophet argues that the unique circumstances of her case warrant a variance.

4. BOP’s Deliberate Indifference

“Deliberate indifference has two components to it: objective and subjective.” *Villegas v. Metro. Govt. of Nashville*, 709 F.3d 563, 568 (6th Cir. 2013). “[T]he objective component ... is met upon a showing that a detainee faced a substantial risk of serious harm and that such a risk is one that society chooses not to tolerate.” *Id.* at 569. The subjective component is satisfied when an official has “(1) subjectively perceived facts from which to infer substantial risk to the prisoner, (2) did in fact draw the inference, and (3) then disregarded that risk.” *Santiago v. Ringle*, 734 F.3d 585, 591 (6th Cir.2013) (citations and internal quotation marks omitted). Such indifference may be “infer[red] from circumstantial evidence, including ‘the very fact that the risk was obvious,’ that a prison official knew of a substantial risk.” *Id.* (quoting *Dominguez v. Corr. Med. Servs.*, 555 F.3d 543, 550 (6th Cir. 2009)). With respect to an impending infectious disease like COVID-19, deliberate indifference is satisfied when corrections officials “ignore a condition of confinement that is sure or

very likely to cause serious illness and needless suffering the next week or month or year,” even when “the complaining inmate shows no serious current symptoms.” *Helling*, 509 U.S. at 33, 36 (holding that a prisoner “states a cause of action ... by alleging that [corrections officials] have, with deliberate indifference, exposed him to conditions that pose an unreasonable risk of serious damage to future health”); see also *Hutto v. Finney*, 437 U.S. 678, 682-685 (1978) (recognizing the need for a remedy where prisoners were crowded into cells and some had infectious diseases).

The decision to release prisoners cannot be made lightly. But arguments against it discount a reality recognized over two centuries ago: The health of prisoners and communities are inextricably linked. Coronavirus confirms that prison walls do not, in fact, separate the welfare of those on the inside from those on the outside.

In this case, the BOP has refused to provide Prophet with medical services, which may lead her to more serious health condition. Prophet’s filed Administrative Remedies and Email Correspondence to get a picture of how difficult it has been for her to cope up during these trying times.

Under 18 U.S.C. § 3582(c)(2), to modify Prophet’s sentence, taking into account the advisory nature of the guidelines after *Booker* and the considerations set forth in 18 U.S.C. § 3553(a). The court should find that a sentence of time served is sufficient, but not greater than necessary, and accounts for the sentencing factors the court must consider pursuant to 18 U.S.C. § 3553(a), specifically deterrence, protection of the public, and respect for the law.

Further, since Prophet’s incarceration began, she has taken numerous steps to attempt to improve himself in “post-conviction rehabilitation.” See *United States v. Parker*, No. 2:98-CR-00749-CAS-1, 2020 WL 2572525, at

*11 (C.D. Cal. May 21, 2020) (finding evidence of defendant's rehabilitation weighed in favor of granting motion for compassionate release; collecting cases).

Ultimately, no factor or combination of factors precludes the requested remedy here, particularly given Prophet's health status. Accordingly, this Court should exercise its discretion to reduce Prophet's sentence because extraordinary and compelling reasons support the reduction.

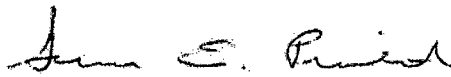
Note: On February 14, 2023, Prophet sought to recall mandate in this case because she was not given the opportunity to file a brief in this appeal to show that the district court abused its discretion even though she filed for a Briefing Schedule so that she could do so.

CONCLUSION

For the above and foregoing reasons, Prophet's petition for a writ of certiorari should be granted.

Respectfully submitted,

March 8, 2023



SUSAN ELISE PROPHET
REG. NO. 26698-045
FCI WASECA
FEDERAL CORR. INSTITUTION
P.O. BOX 1731
WASECA, MN 56093
APPEARING *PRO SE*