

COURTS IN 9TH CIRCUIT SO FAR HAVE DECIDED THAT NO REASON TO DEPART FROM THE EXHAUSTION REQUIREMENTS

Exhaustion of Remedies, FSA, and COVID-19

United States v. Otero, 2020 U.S. Dist. LEXIS 68854

Court: California Southern District Court

Date: April 17, 2020

Importantly, the Court notes that district courts in the Ninth Circuit considering the issue of whether district courts may create an exception to [§ 3582\(c\)\(1\)\(A\)](#)'s 30-day exhaustion requirement have nearly unanimously concluded that failure to exhaust administrative remedies is fatal to a compassionate release petition, even in light of the urgency created by **COVID-19**. See, e.g.,

[United States v. Garza, No. 18-CR-1745-BAS, 2020 U.S. Dist. LEXIS 54228, 2020 WL 1485782, at *2 \(S.D. Cal. Mar. 27, 2020\)](#) (denying motion for compassionate release based on failure to exhaust administrative remedies and noting that "issues such as Mr. Garza's medical condition, the conditions and resources at Terminal Island. . . and decisions as to which prisoners should be released because of the **COVID-19** epidemic are better left to [BOP] and its institutional expertise"); [United States v. Eberhart, No. 13-CR-00313-PJH-1, 2020 U.S. Dist. LEXIS 51909, 2020 WL 1450745, at *2 \(N.D. Cal. Mar. 25, 2020\)](#) ("Because **[*10]** defendant has not satisfied the exhaustion requirement, the court lacks authority to grant relief under [§ 3582\(c\)\(1\)\(A\)\(i\)](#)"); [United States v. Holden, No. 3:13-CR-00444-BR, 2020 U.S. Dist. LEXIS 60123, 2020 WL 1673440, at *7 \(D. Or. Apr. 6, 2020\)](#) ("[18 U.S.C. [§ 3582\(c\)\(1\)\(A\)](#)] does not grant this Court the authority to consider whether to reduce Defendant's sentence until the exhaustion criteria of the [First Step Act] have been met."); [United States v. Young, No. CR14-5242RJB, 2020 U.S. Dist. LEXIS 62286, 2020 WL 1673043, at *2](#)

[\(W.D. Wash. Apr. 6, 2020\)](#) (finding defendant was no entitled to compassionate release where defendant "did not exhaust his administrative remedies"); [United States v. Schuett, No. 214CR00364JADGWF, 2020 U.S. Dist. LEXIS 60419, 2020 WL 1677080, a *1 n.7 \(D. Nev. Apr. 6, 2020\)](#) ("Although the **COVID-19** crisis may be a consideration for compassionate release, [defendant] has not demonstrated that he has exhausted his administrative rights for such a release with the BOP."); [United States v. Carver, No. 4:19-CR-06044-SMJ, 2020 U.S. Dist. LEXIS 60025, 2020 WL 1604968, at *1 \(E.D. Wash. Apr. 1, 2020\)](#) ("The Court's hands are bound by the statute....[A]bsent congressional action to relieve inmates of the exhaustion requirement, the Court is unable to provide the relief Defendant seeks.").

Having examined the rationale in [Raia](#) as well as the rationale expressed by district courts in this circuit, it is clear to this Court that this great weight of authority is persuasive. The Court sees **[*11]** no reason to break step with these decisions. The terms of [§ 3582\(c\)\(1\)\(A\)](#) are plain. Because Defendant has filed this motion without first exhausting his administrative remedies or providing the BOP with 30-days to respond to his request, the Court lacks jurisdiction to consider his motion for compassionate release.

The Court finds the plain meaning of the statute is clear. The statute clearly dictates the protocol Defendant must follow. Defendant may file a motion with the Court 1) after he has fully exhausted his administrative remedies and upon the failure of the BOP to bring a motion on Defendant's behalf *or* 2) after the lapse of 30-days from the time the warden receives his request, whichever is earlier. (*emphasis added*). The fact that the plain text

of the statute omits the word "shall" is not dispositive in determining whether judicial exhaustion is mandatory in light of its plain meaning.

In addition, the Court disagrees with Defendant's argument that the First Step Act's legislative history supports a finding of granting a motion for compassionate release without requiring full exhaustion of administrative remedies. Defendant posits that unlike the PLRA's legislative history, "which underscores the mandatory nature of its exhaustion regime," the legislative [*8] history of the First Step Act underscores the "BOP's failure to properly manage the compassionate release program" by "creating another, direct avenue for prisoners to file a motion, and thus minimizing the role of the BOP as a gatekeeper." See Doc. No. 234-3 at 24. This argument is tenuous at best, especially in light of the fact that courts, "can only look to legislative intent when a statute is ambiguous." [Cleveland v. City of Los Angeles](#), 420 F.3D 981, 990, N. 11(9th Cir. 2005) (citing [HUD v. Rucker](#), 535 U.S. 125, 132, 122 S. Ct. 1230, 152 L. Ed. 2d 258 (2002)). Defendant has failed to cite any binding Ninth Circuit or Supreme Court caselaw indicating that the Court has authority to create judicial exceptions to the exhaustion requirement in [§ 3582\(c\)\(1\)\(A\)](#). The Court need not look elsewhere to interpret the statute. Here, because the statute is clear, review of the legislative history is unnecessary. The Court finds that exhaustion is a jurisdictional requirement.

The Court also finds Defendant's argument that the Court should take immediate action and disregard the required administrative process due to the severity of the pandemic is not persuasive. Defendant lists a host of district court opinions in support. See Doc. No. 234-3 at 16-19.3⚡ However, as the Government points out, most of the cases cited by Defendant address [*9] the propriety of **bail** versus pretrial detention, detention pending sentencing or setting self-surrender dates."4⚡ See Doc. No. 236. at 9. The Government correctly asserts that "only three of the cases cited by Defendant involve situations where defendants were released while serving their sentence. *Id.* at 9.



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