

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

UNITED STATES OF AMERICA,

Plaintiff,

v.

BRUCE E. COSTA, JR.,

Defendant.

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Crim. No. 10-47-LPS

ORDER

At Wilmington this **18th** day of **August, 2021**, having reviewed Defendant Bruce E. Costa, Jr.'s Renewed and Supplemental Motion for Reduction in Sentence Pursuant to 18 U.S.C. § 3582(c)(1)(A)(i) (D.I. 265) and exhibits (Exs. A, B, & C); the government's Response (D.I. 267) and exhibits (D.I. 268); Costa's Reply (D.I. 269); the parties' letters setting forth their positions on how the Court should rule on the pending motion in light of Costa's anticipated transfer to home confinement (D.I. 276, 277); and a letter from Costa's counsel regarding new authority (D.I. 278) and the attached exhibit (Ex. A);

IT IS HEREBY ORDERED that Costa's motion (D.I. 265) is **DENIED** without prejudice.

A compassionate release motion by a sentenced defendant requires the defendant "(1) to exhaust administrative remedies, (2) to show extraordinary and compelling circumstances, (3) to show an absence of dangerousness, and (4) to show that the section 3553(a) factors support a reduced sentence." *United States v. Vurgich*, 2020 WL 4335783, at *3 (D. Del. July 28, 2020) (internal citation omitted).¹

¹ Judge Andrews, who authored *Vurgich*, has expressed skepticism that prong (3), dangerousness,

On March 17, 2021, the Court denied without prejudice Costa's initial motion for compassionate release, finding Costa had failed to show that "extraordinary and compelling reasons" supported a reduction in his sentence. (D.I. 264 at 3) As the Court explained, Costa's argument that he would be at heightened risk of severe health consequences if he contracted coronavirus was undercut by the fact that he had already contracted coronavirus and was, fortunately, in the process of recovery. (*Id.*)

Similarly, the premise underlying the instant motion – that Costa "cannot provide self-care for 'long COVID' in the prison environment" (D.I. 265 at 1) – is undercut by the fact that Costa has now been released on home confinement (*see* D.I. 274).² The relief Costa requested from the Court by his pending motion was to be "release[d] . . . to reside at his parents' home." (D.I. 265 at 5) That has now occurred by virtue of the subsequent action of the Bureau of Prisons ("BOP").

Costa's release does not, however, moot his motion, as the government concedes. (*See* D.I. 277 at 1; *see also* D.I. 276 at 1) Absent further relief from the Court, Costa (while at home) "will remain in BOP custody and the sentence imposed by this Court will not have been

is applicable in light of other circuit court rulings. *See United States v. Flagg*, Crim. A. No. 19-30-RGA D.I. 59 at 2. Whether absence of dangerousness is a separate requirement does not affect the disposition of the pending motion because the Court is denying it under prong (2). Further, in its response to Costa's initial motion for compassionate release, the government conceded that Costa had satisfied prongs (1) and (3). (*See* D.I. 258 at 11, 22) The parties do not address these prongs or prong (4) in their briefing on the instant motion. Based on the totality of the record, however – including all of the parties' many arguments beginning with Costa's first motion for reduction in sentence filed in January 2021 (D.I. 255), and the fact that Costa has served over 79% of his sentence (*see id.* at 2) – the Court concludes that Costa is very likely to meet his burden on prong (4).

² After the parties completed briefing on the instant motion, they informed the Court that the BOP had approved Costa's request for home confinement and that they expected he would be transferred to his parents' home "on or about July 22, 2021." (D.I. 274 ¶¶ 1-2) The Court has confirmed with counsel via electronic mail that this release has now occurred.

reduced.” (D.I. 277 at 1) In the recent letter briefing, Costa asks that the Court reduce the custodial portion of his sentence to time-served and immediately begin the three-year period of supervised release, with appropriate conditions (including intensive substance abuse treatment). (D.I. 276 at 3)

Costa contends that his sentence should be reduced in this manner because his contraction of COVID-19, which allegedly went untreated and developed into “long COVID,” as well as the impact of the pandemic on the facilities in which he has been housed (e.g., lockdowns, lack of visitation), has caused “the sentence initially imposed to have a more punitive and painful impact than this Court originally anticipated or intended.” (*Id.* at 2) With respect to his individual health situation and risks going forward, Costa relies on two declarations from Dr. Sandhaus, a medical consultant, one of which states that “Costa did not receive appropriate medical evaluation and care for his COVID-19 infection and this may have contributed to the severity of his [l]ong COVID,” adding that “[t]he prison environment is more likely to lead to COVID-19 reinfection than other environments.” (D.I. 265 Ex. A at 3) Even accepting these opinions as true,³ the fundamental premise of Costa’s contention is that he cannot obtain proper

³ In making this assumption, the Court is aware of the credibility issues inherent in Costa’s statements, including those he has made about his condition and treatment during his period of acute COVID as well as during his extended period of long COVID. The Court further recognizes there is a lack of medical records supporting Costa’s self-reported symptoms. (*See* D.I. 267 at 3-4) (government arguing that “the objective BOP medical record does not corroborate that Defendant is currently experiencing COVID-19-related symptoms[;] . . . Defendant’s self-reported symptoms, meanwhile, must be viewed in light of his history of deceptive conduct”) The medical expert’s opinions are only as reliable as the factual premises on which they are based, and those “facts” are all based on Costa’s own reporting. (*See, e.g.*, D.I. 265 Ex. B) (Dr. Sandhaus stating that “[a]lthough there is no documentation in the current medical record provided to me, it has been reported that Mr. Costa continues to have [l]ong COVID symptoms”) On the other hand, Costa is right to question why the government has not provided any evidence showing Costa did *not* exhibit the symptoms he has reported (such as a declaration from BOP personnel who have interacted with Costa in the time since he contracted COVID) and to ask what the non-medical records show about whether Costa repeatedly asked

treatment *in prison*. But he is no longer in prison; he is in his parents' home. And, as he has conceded, "[i]f released to supervision, . . . [he] would again have control of his own health care and could obtain proper treatment." (D.I. 265 at 2) At present, then, there is no reason for the Court to presume anything other than that Costa is receiving proper treatment for his health conditions, including long COVID. Certainly, Costa has not proven anything to the contrary.

Costa also alleges that his drug treatment as a non-custodial, supervised releasee would be superior to that he would receive through a BOP-based program for people on home confinement, urging that his treatment should be directed by "an experienced U.S. Probation Officer, not an overworked and probably undertrained staffer from a contract halfway house." (D.I. 276 at 3) This conclusory allegation has no factual support in the record. The Court has no basis to find that any difference in the drug treatment (assuming there is any) constitutes an "extraordinary and compelling reason" permitting a reduction in Costa's sentence.

As Costa points out, without a reduction in sentence, he remains in BOP custody and is subject to possible reincarceration. (*See id.* at 2-3; D.I. 278) He has pointed to BOP policy contemplating, at the conclusion of the state of emergency, the return to a prison setting of certain individuals who are currently on home confinement (*see* D.I. 276 at 3) and identifies defendants who have faced immediate reincarceration based on a violation of release conditions (*see, e.g.*, D.I. 278 & Ex. A). In denying Costa's pending motion, the Court is *not* finding that his reincarceration would be consistent with the goals of sentencing. As far as the Court can discern, however, Costa is at no imminent risk of being ordered back to prison. If or when it were to appear otherwise, Costa is free to renew his motion yet again (and, if warranted, request expedited consideration of it). If or when that occurs, the Court will again evaluate the factual

for medical attention that he did not receive. (*See* D.I. 269 at 2 & n.2; *id.* at 3-4)

circumstances and applicable legal authorities. For today's purposes, it is enough to say that the *possibility* that Costa may be reincarcerated does not – alone, or in combination with the other evidence of record – constitute an extraordinary and compelling reason permitting the Court to grant his requested reduction in sentence.

A handwritten signature in black ink, appearing to read 'L. P. Stark', written over a horizontal line.

HONORABLE LEONARD P. STARK
UNITED STATES DISTRICT JUDGE