

# **EXHIBIT 2**

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Criminal Action
	)	No. 16-10236-MLW
v.	)	
	)	
ROBERT M. PENA,	)	
	)	
Defendant.	)	
	)	

BEFORE THE HONORABLE MARK L. WOLF  
UNITED STATES DISTRICT JUDGE

VIDEOCONFERENCE  
HEARING

May 15, 2020  
11:01 a.m.

John J. Moakley United States Courthouse  
Courtroom No. 1  
One Courthouse Way  
Boston, Massachusetts 02210

Kelly Mortellite, RMR, CRR  
Official Court Reporter  
One Courthouse Way, Room 3200  
Boston, Massachusetts 02210  
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1 P R O C E E D I N G S

2 THE COURT: Good morning. This is Judge Wolf. I  
3 would appreciate it if the participants would identify  
4 themselves for the record and Mr. Pena could confirm that he's  
5 on the call. And if, as I hope, there's a representative of  
6 the Bureau of Prisons on the call, I would like him or her to  
7 please identify themselves. But let's see. Mr. LaMacchia.

8 MR. LAMACCHIA: Good morning, Your Honor.

9 MR. KATZ: Good morning, Your Honor. Scott Katz for  
10 Mr. Pena.

11 THE COURT: Mr. Pena, are you on the line?

12 THE DEFENDANT: Yes, yes, Your Honor.

13 THE COURT: And is there a representative of the  
14 Bureau of Prisons on the line?

15 MR. LARKIN: Yes, Your Honor, Steven Larkin,  
16 correctional counselor.

17 THE COURT: Okay.

18 U.S. PROBATION: Mona Lisa Andrade for U.S. Probation.

19 THE COURT: Thank you. This morning I realized that  
11:02 20 this hearing is being conducted on the understanding that  
21 Mr. Pena is not infected by the COVID-19 virus. And one of the  
22 issues argued two days ago was whether, if he's ordered  
23 released, he should be required to serve 14 days quarantine and  
24 essentially solitary confinement at the camp at Devens.

25 So this morning I ordered that the Bureau of Prisons

1 test Mr. Pena since the warden told me on Wednesday that it had  
2 recently received a large number of tests and that the results  
3 could be obtained very quickly. Let's see. Mr. Larkin, has  
4 that test been administered?

5 MR. LARKIN: Yes, sir, about 20 minutes ago.

6 THE COURT: Okay. Do you have the results yet?

7 MR. LARKIN: They are pending, momentarily, I hope.

8 THE COURT: Okay. Well, I think we should proceed.

9 Actually, I think I should thank you and the warden. And I'm  
10 going to proceed, but when you the get the results, do you  
11 expect they're going to bring you the results?

12 MR. LARKIN: I believe that the medical department  
13 will email me immediately and let me know.

14 THE COURT: Okay. And then you're authorized and  
15 indeed directed to tell me that you have the results, and I  
16 will pause, because if they are positive, that will be a  
17 material change. Okay?

18 MR. LARKIN: Yes, Your Honor.

19 COURT REPORTER: Excuse me, Your Honor.

11:04 20 (Discussion off the record.)

21 THE COURT: Yes. Everybody except -- well, in fact at  
22 this point everybody should mute and Mr. Larkin can unmute. In  
23 addition, and I think this is working, the only pictures I see  
24 are of the attorneys and the stenographer.

25 This is an emergency motion with urgency to having it

1 decided, particularly if it's decided favorably to the  
2 defendant, Robert Pena, who is seeking prompt release, and  
3 therefore I've decided to render this decision orally. The  
4 transcript will be the record of the decision. The parties  
5 should order the transcript on a most expedited basis so it  
6 will be available to the First Circuit. I will issue a  
7 conclusory short memorandum and order memorializing the  
8 results. It's possible that I may convert the transcript into  
9 a more formal memorandum and order; however, I don't expect to  
11:06 10 do that.

11 On April 23, 2019, I sentenced the defendant Robert  
12 Pena to serve 32 months in prison for defrauding the United  
13 States government of \$2,500,000. That term in custody I  
14 ordered be followed by two years supervised release. I also  
15 ordered restitution in the amount of \$2,500,000.

16 The defendant has appealed his sentence. The appeal  
17 is pending in the First Circuit. The defendant began serving  
18 his sentence at the camp at the Federal Medical Center Devens  
19 on October 20, 2019. Ordinarily, he would complete his term in  
11:07 20 custody on January 26, 2022. In view of the COVID-19 pandemic  
21 and Mr. Pena's age, 70 years old, primarily, the defendant  
22 requested that the Bureau of Prisons exercise its authority to  
23 order that he complete his sentence in home confinement. The  
24 Bureau of Prisons denied that request.

25 On April 8, 2020, the defendant filed a request with

1 the Bureau of Prisons that it move to file a motion requesting  
2 that the court reduce Mr. Pena's sentence pursuant to 18 United  
3 States Code Section 3582(c)(1)(A)(i), which is customarily  
4 known as the compassionate release statute. The warden of FMC  
5 Devens, Stephen Spaulding, denied the defendant's request on  
6 April 22, 2020. The defendant filed an emergency motion for  
7 release pursuant to Section 3582(c)(1)(A)(i) on April 21, 2020.  
8 I will refer to that at times as "the motion." Defendant asks  
9 the court to serve the remainder of his sentence in home  
11:09 10 confinement.

11 Because the appeal of his sentence is pending in the  
12 First Circuit, the parties agree and I agree that I do not have  
13 jurisdiction to grant the motion now. Therefore, the defendant  
14 has filed a motion for an indicative ruling under Federal Rule  
15 of Criminal Procedure 37(a)(3), asking that I state that I  
16 would grant the motion for release and ask the First Circuit to  
17 remand the case so I can do that.

18 I should note -- I'm sorry. So I have conducted  
19 hearings on May 6 and May 13, 2020 on the motion. On May 13,  
11:10 20 2020, the FMC Devens warden provided lengthy, candid and  
21 informative testimony. As I will explain, the warden did not  
22 consider the merits of the defendant's request for home  
23 confinement or the merits of his request that the Bureau of  
24 Prisons file a motion for compassionate release because, under  
25 Bureau of Prisons policy, the defendant has not served a

1 sufficient percentage of his sentence. The defendant will  
2 become eligible for consideration for home confinement under  
3 the Bureau of Prisons policies in July 2020.

4 Based on the criteria and two memoranda from Attorney  
5 General William Barr, if a defendant were now eligible, the  
6 warden testified he would recommend that the defendant be  
7 released to home confinement to his superiors at the Bureau of  
8 Prisons. He expects that request would be granted. I agree  
9 that release to home confinement would be justified and  
10 appropriate.

11:11

11 As a practical matter, the issue for me at this point  
12 is whether the defendant should be required to remain at Devens  
13 until July 2020 and risk being infected by the COVID-19 virus,  
14 and if infected, face the high risk of hospitalization and the  
15 possible risk of dying, or whether he should instead now be  
16 ordered to be released to home confinement by me if the First  
17 Circuit remands the case.

11:12

18 I find that the defendant has proven he should be  
19 released now to home confinement if, as we have assumed, he has  
20 not already been infected by the COVID-19 virus. Therefore,  
21 I'm ordering -- well, I have ordered the Bureau of Prisons to  
22 test the defendant today and report the results to me. We  
23 expect to get those results soon. If the defendant has tested  
24 negative -- and I recognize these tests are not perfect, but  
25 they're being relied on for many important purposes. If the



1 defendant's test is negative, I will grant the motion for an  
2 indicative ruling.

3 If and when the First Circuit remands, I will order  
4 that the defendant be tested again. If the defendant again  
5 tests negative, I will grant his Section 3582(c)(1)(A)(i)  
6 motion. I will reduce his sentence to time served and order  
7 his immediate release to home confinement. More specifically,  
8 I will order the defendant serve 36 months of supervised  
9 release, with the remainder of the 32-month prison sentence I  
10 imposed to be served in home confinement as a condition of  
11 supervised release. That is, he would be in home confinement  
12 until January 26, 2022.

13 And as conditions of supervised release, he would be  
14 on electronic monitoring. He would be allowed to leave only  
15 for medical appointments approved by Probation, for medical  
16 emergencies reported to Probation within 24 hours, and to  
17 participate in religious observances if pre-approved by  
18 Probation, which Probation would not be authorized to do when  
19 the United States or the government of Massachusetts is  
11:15 20 recommending against congregate religious observances.

21 In addition, I would continue the conditions of  
22 supervised release originally imposed, including the  
23 requirement that the defendant pay \$2,500,000 in restitution.  
24 After January 26, 2022, the defendant will have about 17 more  
25 months of supervised release, as I said, on the conditions

1 originally imposed, including the restitution requirement and  
2 the requirements that he provide Probation with any requested  
3 financial information, which may be shared with the U.S.  
4 Attorney's Office. As I'll explain later, the U.S. Attorney's  
5 Office may tell Probation what financial information it  
6 requests and Probation shall obtain that information from the  
7 defendant and share it with Probation.

8 Basically, I will be increasing the term of supervised  
9 release for the length of the unserved sentence up to the  
10 statutory maximum, as I understand it, of three years, doing so  
11 as authorized by Section 3582(c)(1)(A)(i). This will add about  
12 16 months -- well, the defendant will have about 16 months of  
13 supervised release if he successfully completes his period of  
14 home confinement.

15 The reasons for this decision are as follows:

16 Prior to the enactment of the First Step Act in  
17 December 2018, the court had the authority to order the  
18 compassionate release of a prisoner only if the Bureau of  
19 Prisons filed a motion requesting a reduction in sentence. As  
20 I wrote in 2016 in *United States v. DiMasi*, 220 F. Supp. 3d 173  
21 at 181-82, the Sentencing Commission had found based on reports  
22 from the Department of Justice Inspector General, among others,  
23 that the Bureau of Prisons had been too restrictive in making  
24 compassionate release motions. Therefore, in 2016, the  
25 Sentencing Commission revised sentencing guidelines Section

1 1B1.13 to encourage the Bureau of Prisons to file motions for  
2 compassionate release more frequently.

3 As I wrote in *DiMasi*, this was in part because the  
4 Sentencing Commission found that, while only the director of  
5 the Bureau of Prisons had the statutory authority to file a  
6 motion for compassionate release, the court is in a unique  
7 position to assess whether extraordinary and compelling  
8 circumstances exist and whether a reduction is warranted and,  
9 if so, the amount of the reduction.

11:18 10 In essence, the Sentencing Commission encouraged the  
11 Bureau of Prisons to be more liberal in creating opportunities  
12 for judges to consider whether compassionate release is  
13 justified and reminded judges of their statutory obligation to  
14 consider the Section 3553(a) factors in the Commission's  
15 guidance in making such decisions. That's in *DiMasi* at page  
16 182. In December 2018, the First Step Act modified the  
17 compassionate release statute to authorize a prisoner to file a  
18 motion for a reduction of sentence if the Bureau of Prisons has  
19 not granted his request to do so within a certain period of  
11:19 20 time. The First Step Act of 2018 is Public Law number 115-391.

21 The compassionate release statute, 18 United States  
22 Code Section 3582(c)(1)(A)(i), now states in pertinent part the  
23 court, upon motion of the director of the Bureau of Prisons or  
24 upon motion of the defendant after the defendant has fully  
25 exhausted all administrative rights to appeal a failure of the

1 Bureau of Prisons to bring a motion on the defendant's behalf  
2 or the lapse of 30 days from the receipt of such a request by  
3 the warden of the defendant's facility, whichever is earlier,  
4 may reduce the term of imprisonment and may impose a term of  
5 probation or supervised release with or without conditions that  
6 does not exceed the unserved portion of the original term of  
7 imprisonment, after considering the factors set forth in  
8 Section 3553(a), to the extent that they are applicable, if it  
9 finds that, among other alternatives, (i) extraordinary and  
11:21 10 compelling reasons warrant such a reduction and that such a  
11 reduction is consistent with the applicable policy statements  
12 issued by the Sentencing Commission. At the May 6, 2020  
13 hearing, the parties agreed that the 30-day exhaustion  
14 requirement is not an impediment to my deciding the pending  
15 motions of the motion.

16 Assuming Mr. Pena has tested negative today for the  
17 COVID-19 virus --

18 MR. LARKIN: Your Honor, excuse me?

19 THE COURT: Yes.

11:22 20 MR. LARKIN: Steven Larkin, correctional counselor.  
21 His test results have come back.

22 THE COURT: Yes.

23 MR. LARKIN: And they are negative.

24 THE COURT: Thank you very much, Mr. Larkin.

25 MR. LARKIN: Yes, Your Honor.

1 THE COURT: Well, it's timely because I was just  
2 addressing that.

3 So as the defendant has tested negative for the  
4 COVID-19 virus today, I find that there are extraordinary and  
5 compelling reasons that warrant allowing Mr. Pena in effect to  
6 serve the remainder of his prison sentence in home confinement.  
7 I also find that doing so would be consistent with the  
8 applicable policy statements of the Sentencing Commission.  
9 President Donald J. Trump has declared a national emergency due  
11:23 10 to the pandemic from coronavirus disease 19, COVID-19. Because  
11 there is no vaccine to prevent COVID-19 and because COVID-19  
12 may be spread by infected but asymptomatic individuals, the  
13 Centers For Disease Control and Prevention, the CDC, has  
14 advised members of the public to wash their hands often, avoid  
15 close contact, that is, being within less than six feet of  
16 other people, and this is called social distancing, staying at  
17 least six feet away from others. The CDC advises people to  
18 wear a face covering when around others and to regularly clean  
19 and disinfect frequently touched surfaces.

11:24 20 The CDC has also advised that these measures are  
21 particularly important for individuals over 65 years old  
22 because they, amongst other groups, are at higher risk for  
23 developing more serious complications from COVID-19, including  
24 death. The CDC's view is supported by data from throughout the  
25 United States and in Massachusetts.

1 As of May 12, 2020, the CDC reported that of the  
2 37,300 deaths in the nation attributed to COVID-19, for which  
3 it had information concerning the decedent's age, 29,655 or  
4 79.5 percent were individuals age 65 or older. In  
5 Massachusetts, as of May 12, 4,357 or 85.3 percent of the 5,108  
6 deaths attributed to COVID-19 were people age 70 or older.  
7 These figures are in docket number 196.

8 Almost all of the individuals who have died from  
9 COVID-19 in Massachusetts at least had some preexisting  
10 condition, according to the Mass. Department of Public Health  
11 dashboard on May 12, 2020 at page 13. The CDC defines severe  
12 obesity as a condition that puts a person at higher risk of  
13 severe illness from COVID-19. Severe obesity is defined as  
14 having a body mass index, or BMI, of 40 or higher. Mr. Pena is  
15 70 years old. He is six-foot-two. When he began serving his  
16 sentence in October 2019, he weighed 297 pounds and had a BMI  
17 of 37.2, according to his medical records, docket number 189-2.

18 In an April 21, 2020 declaration under oath in support  
19 of the motion, Mr. Pena stated that when he was last weighed,  
11:27 20 "I was 307 pounds." This is docket number 170-1. If that were  
21 true, his BMI would have been above 39, on the cusp of severe  
22 obesity. However, I find that the statement Mr. Pena made that  
23 when he was last weighed he weighed 307 pounds was false.  
24 Mr. Pena's medical records show that on March 24, 2020,  
25 Mr. Pena weighed 243 pounds. On that date, Mr. Pena, according

1 to the medical record, reported that he had been exercising to  
2 lose weight. I find that Mr. Pena knew he had not recently  
3 weighed 307 pounds.

4 This false statement influences me to conclude that  
5 his home confinement should be on electronic monitoring,  
6 although my colleagues and I are rarely ordering that during a  
7 pandemic because it requires some interaction, physical  
8 interaction between the Probation Office and the defendant.

9 However, I do find that it's necessary in this case. However,  
10 Mr. Pena's false statement does not alter the conclusion that a  
11 reduction in his sentence is most appropriate. By virtue of  
12 being 70 alone, the defendant is at significant risk of  
13 suffering greatly if infected by the COVID-19 virus. More  
14 specifically, the CDC estimates that, if infected, a person  
15 between 65 and 84 years old faces a 31 to 59 percent chance of  
16 hospitalization, an 11 to 31 percent chance of admission to an  
17 intensive care unit, and a 4 to 11 percent chance of dying.  
18 The citation for that is in docket 171, footnote 7.

19 There is also a significant risk that the COVID-19  
20 virus will get into the Devens camp in which Mr. Pena is held.  
21 The warden has been making his best efforts to keep inmates at  
22 the medical facility and at the camp at Devens from becoming  
23 infected. However, as of May 13, 2020, eight inmates and two  
24 staff at the medical facility have tested positive for the  
25 COVID-19 virus according to docket number 204, which includes

1 the Bureau of Prisons website.

2 The warden recognizes that, although he has been  
3 aggressive in his efforts to protect inmates at the camp, he  
4 has been, quote, "lucky," end quote, that none have been  
5 infected yet. There is staff that work in both the medical  
6 facility and the camp.

7 In a decision earlier this week, my colleague, William  
8 Young, cited the CDC for several propositions that are relevant  
9 here. His decision is in *Savino*, 20-10617, docket number 175,  
10 beginning at 15.

11 As Judge Young explained, the CDC has cautioned that  
12 asymptomatic individuals may be infected and spread the virus.  
13 However, the warden does not have the resources to test staff  
14 members who do not have a fever or other symptoms of COVID-19  
15 infection, and the camp at Devens does not do that testing, nor  
16 does FMC Devens do any contact tracing of staff members to  
17 determine whether they have interacted with an infected  
18 individual in the community. The CDC, however, has stated that  
19 such tracings should be a priority for congregate living  
20 settings such as prisons and camps. Therefore, I find that it  
21 is probable that, despite the warden's best efforts, with the  
22 limited resources available, his good luck will not continue  
23 and an inmate at the camp will become infected. If and when  
24 that occurs, there is significant potential that the virus will  
25 spread, as the CDC has recognized with regard to prisons and



1 jails generally, another subject discussed by Judge Young in  
2 *Savino*, at page 21.

3 Social distancing is not possible to maintain in the  
4 camp at Devens at all times. For example, inmates in the camp  
5 sleep in bunk beds and small cubicles without ceilings.

6 Mr. Pena does not share his cubicle. However, most cubicles  
7 have two inmates. There is only a thin wall between the  
8 cubicles. Inmates are not six feet apart when they sleep, for  
9 example. In addition, they must share bathrooms and other  
10 facilities. Therefore the risk of any infection spreading at  
11 the camp is significant.

12 The court would not be required to consider Mr. Pena's  
13 motion for compassionate release if the Bureau of Prisons had  
14 granted his request to serve the remainder of his 32-month  
15 sentence in home confinement. Prior to the pandemic, Section  
16 3624(c)(2) only permitted the Bureau of Prisons to transfer a  
17 prisoner to home confinement for the shorter of 10 percent of  
18 the term of imprisonment of that prisoner or six months.

19 Therefore, ordinarily, Mr. Pena would not have been eligible  
20 for a transfer to home confinement until October 22, 2021.

21 Devens' case management coordinator, Amber Bourke,  
22 asserts in a declaration that Mr. Pena is ineligible for  
23 consideration for home confinement until that date. That, as a  
24 matter of law, is incorrect. The statute was altered by the  
25 Coronavirus Aid Relief and Economic Security act, the CARES

1 Act, Public Law 116-136, 134 Stat. 281, a law enacted on March  
2 27, 2020.

3 Section 12003(b)(2) of the CARES Act permits the  
4 Attorney General to broaden the scope of inmates who may be  
5 considered for home confinement if the Attorney General finds  
6 that COVID-19 is materially affecting the Bureau of Prisons  
7 operations. Attorney General William Barr made that finding on  
8 April 3, 2020 and instructed the Bureau of Prisons to expand  
9 the review for transfers to home confinement to include all  
10 at-risk inmates, not only those who were previously eligible  
11 for transfer. His April 3, 2020 memorandum is docket number  
12 197-2.

13 The Attorney General directed the Bureau of Prisons to  
14 assess inmates in a manner guided by the factors in his March  
15 26, 2020 memorandum, understanding, though, that inmates with a  
16 suitable confinement plan will generally be appropriate  
17 candidates for home confinement rather than continued detention  
18 at institutions in which COVID-19 is materially affecting their  
19 operations. In addition, the Attorney General expressed in his  
20 April 3 memorandum that any assessments should be  
21 individualized.

22 In his March 26, 2020 memorandum, the Attorney General  
23 instructed the Bureau of Prisons to prioritize the use of  
24 transfers to home confinement for inmates seeking transfer  
25 based on the pandemic. The Attorney General stated that

1 decisions should be made based on the totality of the  
2 circumstances. He also provided a non-exhaustive list of  
3 discretionary factors. That non-exhaustive list of  
4 discretionary factors is as follows:

5 1. The age and vulnerability of the inmate to  
6 COVID-19 in accordance with CDC guidelines.

7 2. The security level of the facility currently  
8 holding the inmate, with priority given to inmates residing in  
9 low and minimum security facilities.

11:38 10 3. The inmate's conduct in prison.

11 4. The inmate's score under a series of factors  
12 called PATTERN, which measures the risk of recidivism.

13 5. Whether the inmate has a demonstrated and  
14 verifiable re-entry plan that will prevent recidivism and  
15 maximize public safety, including verification that the  
16 conditions under which the inmate would be confined upon  
17 release would present a lower risk of contracting COVID-19 than  
18 the inmate would face in his or her Bureau of Prisons facility.

19 6. The inmate's crime of conviction and assessment of  
11:39 20 the danger posed by the inmate to the community. Some  
21 offenses, such as sex offenses, will render an inmate  
22 ineligible for home detention. Other serious offenses should  
23 weigh more heavily against consideration for home confinement.  
24 Those are in the Attorney General's March 26, 2020 memorandum,  
25 which is docket number 197-1.

1           Despite the directions from the Attorney General, the  
2 warden did not consider whether Pena satisfied these criteria  
3 and therefore should be allowed to serve the remainder of his  
4 sentence in home confinement. That is because the Bureau of  
5 Prisons has directed its wardens not to evaluate inmates for  
6 release under the Attorney General's criteria unless they have  
7 served 50 percent or more of their sentence or have served 25  
8 percent or more of their sentence and have 18 months or less to  
9 serve. This Bureau of Prisons policy statement is docket  
10 number 197-3.

11:40

11           Warden Spaulding testified that an exception to these  
12 eligibility requirements, these percentages can be made only if  
13 Bureau of Prisons headquarters in Washington, D.C. orders a  
14 warden to evaluate for home confinement an inmate who does not  
15 meet the criteria. Although the warden did not know it when he  
16 was testifying about the Bureau of Prisons' standards and  
17 procedures, such a request for an evaluation was evidently made  
18 by Bureau of Prisons headquarters concerning Paul Manafort, a  
19 71-year-old inmate who had served only 23 months of a 77-month  
20 sentence, and he was released to home confinement on May 13,  
21 2020 while Warden Spaulding was testifying.

11:41

22           Mr. Pena will have served 25 percent of his sentence  
23 and have 18 months remaining in July 2020, two months from now.  
24 Warden Spaulding testified that in view of the criteria and the  
25 Attorney General's March 26 and April 3, 2020 memoranda, he

1 would then recommend Mr. Pena's release to home confinement.  
2 More specifically, the warden stated that he would deem  
3 Mr. Pena to be an at-risk inmate based on his age, 70, alone.  
4 The warden does not view Mr. Pena as otherwise vulnerable under  
5 the CDC guidelines.

6 Mr. Pena is held in a minimum security facility. The  
7 warden said his conduct has been exemplary. Mr. Pena's PATTERN  
8 score indicates he presents a minimum risk of recidivism.  
9 Mr. Pena has an appropriate plan, if released, that is, to live  
10 with his wife in their single-family home in Falmouth,  
11 Massachusetts. In addition, in the warden's view, Mr. Pena  
12 would not pose a danger to the community.

13 The warden also implicitly indicated that Mr. Pena  
14 would be at a lower risk of contracting the COVID-19 virus at  
15 home than at FMC Devens when he found that Mr. Pena's release  
16 plan was adequate. However, as indicated earlier, Warden  
17 Spaulding did not do this analysis concerning Mr. Pena because  
18 Mr. Pena had not served at least 25 percent of his sentence,  
19 nor did the warden consider whether there were extraordinary  
20 and compelling reasons to file a motion requesting that the  
21 court allow Mr. Pena to serve the remainder of his sentence in  
22 home confinement when he denied -- when the warden denied  
23 Mr. Pena's request for such a motion on April 20, 2020. The  
24 warden did not do so because in response to the First Step Act  
25 amendment to Section 3582(c), in December 2018, the Bureau of

1 Prisons issued a new program statement concerning compassionate  
2 release motions. It is numbered 5050.50. It was issued on  
3 January 17, 2019.

4 In that program statement, the Bureau of Prisons  
5 described its criteria for filing a reduction in sentence  
6 motion for an elderly inmate. The wardens were directed to  
7 file such motions only if the inmate was 70 years old and had  
8 served 30 years or more or the inmate was 65 and had a serious  
9 medical condition and had served 50 percent of his sentence or  
10 the inmate was 65 and served the greater of ten years or 75  
11 percent of his sentence. These restrictions appear to this  
12 court to be a continuation of the policies and practices of the  
13 Bureau of Prisons, the restrictive policies and practices of  
14 the Bureau of Prisons that prompted first the revision of the  
15 sentencing guidelines of 2016 and then the First Step Act  
16 amendment in 2018 permitting prisoners to file Section 3582  
17 (c) (1) (A) (i) motions themselves.

18 The Bureau of Prisons Program Statement 5050.50 does  
19 not even recognize or discuss the fact that the First Step Act  
11:46 20 added the provision that a reduction in sentence motion could  
21 be justified by extraordinary and compelling reasons on which  
22 Mr. Pena relies now. In any event, Warden Spaulding did not  
23 consider the COVID-19 pandemic or anything specific to Mr. Pena  
24 other than how much of his sentence he had served when the  
25 warden denied Mr. Pena's request that the Bureau of Prisons

1 file a motion for reduction of his sentence, rather solely  
2 because Mr. Pena had not served as long as required by the  
3 Bureau of Prisons program statement, Warden Spaulding denied  
4 his request for a motion. However, when asked why -- if Warden  
5 Spaulding would in July 2020 recommend that Mr. Pena serve the  
6 remainder of his sentence in home confinement if I do not order  
7 his release now, in May, to avert the risk that Mr. Pena will  
8 get infected, then within the next two months, the warden  
9 responded, quote, "That's a great question," end quote.

11:48 10 As indicated earlier, I now find that there are  
11 extraordinary and compelling reasons that justify reducing  
12 Mr. Pena's sentence to time served and to increasing his  
13 supervised release from two to three years. As part of this,  
14 it is most appropriate to require that Mr. Pena serve as a  
15 condition of supervised release until January 23, 2022 in home  
16 confinement on electronic monitoring.

17 As the President and Attorney General, among many  
18 others, have recognized, the virtually unprecedented COVID-19  
19 pandemic is extraordinary. It has created unforeseen and  
11:49 20 extreme risk to the health of inmates generally and  
21 particularly to those who are 65 and older. With regard to  
22 Mr. Pena, there are significant risks that staff at the Devens  
23 camp will become infected; that the infection will spread to  
24 inmates; that, if Mr. Pena becomes infected, he will by virtue  
25 of his age alone face a significant risk of suffering to a

1 degree that will require hospitalization and also a risk of  
2 dying. I find that the Section 3553(a) factors weigh in favor  
3 of allowing Mr. Pena to in effect serve the remainder of his  
4 sentence in home confinement.

5 As I said in sentencing Mr. Pena in 2019, he committed  
6 a serious fraud over a long period of time. He defrauded the  
7 United States of \$2,500,000. However, as I also said at his  
8 sentencing, he was in many other respects a good person,  
9 including he was a faithful father, a devoted husband and a  
10 very good friend as well as a contributor to his community.  
11 That is why I imposed only a 32-month sentence.

12 Mr. Pena has now tested negative for the virus. If he  
13 does so again before being released, he will not be a danger to  
14 the health of the community. As I found at his sentencing, a  
15 prison sentence was not necessary to deter Mr. Pena from  
16 committing more crimes and thus to protect the public. I  
17 believed in 2019, in effect, that Mr. Pena had learned his  
18 lesson. His false statement about his weight causes me some  
19 concern about that conclusion, but I continue to believe that  
20 he will not commit crimes if released.

21 As in all white-collar cases, the interest of general  
22 deterrence is important. As trillions of dollars are being  
23 made available quickly by the government, general deterrence is  
24 now an especially important consideration in my view. However,  
25 in view of the danger of being in prison created by the



1 pandemic, the seven months Mr. Pena has served should be  
2 sufficient to send the message that it would be a  
3 miscalculation, potentially a fatal miscalculation, for anyone  
4 to engage in fraud now.

5 As I said in the May 6 and May 13 hearings, I have  
6 been concerned that ordering Mr. Pena's release might result in  
7 unjustified disparity, particularly regarding others 70 years  
8 old or older at the Devens camp. However, as of May 8, there  
9 were only eight inmates 70 and older at the camp. One of them,  
10 John DiMenna, was granted a reduction of sentence to home  
11 confinement by the court over the Bureau of Prisons' objections  
12 on May 11, 2020. A judge in Connecticut did that.

13 Warden Spaulding testified that two or three other  
14 inmates at the camp over age 70 will be eligible and are  
15 scheduled to be released to home confinement before July 2020.  
16 Therefore, if Mr. Pena's released, there will be three others  
17 over 70 in the camp. If they are similarly situated to  
18 Mr. Pena, the most appropriate way to avoid unjustified  
19 disparity will be for the Bureau of Prisons to transfer them to  
20 home confinement or for a judge to order that.

21 Under Section 3553(a), I must also consider whether  
22 allowing Mr. Pena to complete his sentence in home confinement  
23 will promote respect of the law. Fundamental to this is giving  
24 integrity to the bedrock principle of Equal Justice.

25 As explained earlier, on May 13, 2020, Warden

1 Spaulding explained that he denied Mr. Pena's request for home  
2 confinement solely because of the Bureau of Prisons' policy  
3 that made Mr. Pena ineligible for consideration because  
4 Mr. Pena had not served 25 percent of his sentence and was now  
5 within 18 months of the end of it. However, as the warden was  
6 testifying, the Bureau of Prisons evidently ordered an  
7 exception to this requirement for President Trump's former  
8 campaign manager, Paul Manafort, and transferred Manafort to  
9 home confinement although he had served only 23 months of a  
10 77-month sentence.

11 Every person and case is unique. Mr. Manafort may  
12 have health problems that placed him at particularly high risk.  
13 However, making an exception to the Bureau of Prisons' policy  
14 for him and refusing to consider Mr. Pena and other elderly  
15 inmates' requests for relief on their merits will inevitably  
16 raise reasonable questions about whether justice is indeed  
17 blind and whether the administration of justice today deserves  
18 respect. I hope that granting Mr. Pena the transfer to home  
19 confinement that is otherwise justified will in a small way  
20 counter those concerns.

21 Granting Mr. Pena's motion will also be consistent  
22 with the relevant policy statements of the Sentencing  
23 Commission. Using the same language as Section 3582  
24 (c) (1) (A) (i), as amended by the First Step Act, Sentencing  
25 Guideline 1B1.3(1) (a) states that courts should consider the

1 Section 3553(a) factors and may reduce a sentence if  
2 extraordinary and compelling reasons warrant a reduction.

3 The guidelines were last amended on November 1, 2018,  
4 a month before the First Step Act amendment to Section 3582  
5 (c)(1)(a)(i), removing the requirement that the Bureau of  
6 Prisons file the motion for reduction of sentence. The  
7 Commission has not amended the guidelines since November 1,  
8 2018, evidently because it doesn't have enough members to take  
9 official action.

11:57 10 In any event, the guidelines are out of date. For  
11 example, application note four says that a reduction in  
12 sentence may be granted only upon a motion by the Bureau of  
13 Prisons. This is not true after the First Step Act.  
14 Application note 1(D), which also requires a determination by  
15 the Bureau of Prisons that extraordinary and compelling  
16 circumstances exist, is similarly vestigial and inoperative. A  
17 number of courts have reached this conclusion, one in the  
18 Southern District of New York cites cases, that's *Lisi*, 2020  
19 Westlaw 881994.

11:58 20 Where, as here, the Bureau of Prisons has not  
21 considered the existence of the COVID-19 pandemic, the Section  
22 3553(a) factors or anything other than the amount of time  
23 Mr. Pena has served, it would be especially inappropriate to  
24 deny Mr. Pena's motion because the Bureau of Prisons has not  
25 filed it itself.

1 More instructive is the fact that Warden Spaulding  
2 would in July 2020 recommend Mr. Pena for home confinement  
3 based on the facts that exist today and there are compelling  
4 reasons not to perpetuate the significant risk to Mr. Pena as  
5 he is not now infected.

6 Therefore, I am allowing Mr. Pena's motion for an  
7 indicative ruling, docket number 173. I am requesting that the  
8 First Circuit remand this case to me. I will order that  
9 Mr. Pena be tested again after remand. If he again tests  
10:00 10 negative, I will order his immediate release. I'm not going --  
11 I do not intend to order that he be in quarantine for 14 days  
12 at Devens. That would require Mr. Pena to stay there  
13 essentially in solitary -- well, in solitary confinement for 14  
14 more days. That would be more punitive than helpful. It would  
15 perpetuate the risk that he would become infected.

16 As I've said, I intend to increase Mr. Pena's term of  
17 supervised release from two years to three years with all the  
18 time until January 26, 2022 to be served in home confinement on  
19 electronic monitoring. He will be allowed to leave only with  
12:01 20 the permission of Probation for medical appointments. If he  
21 suffers a medical emergency, he will not have to get approval  
22 in advance, but he will have to report that to Probation within  
23 24 hours. If he's pre-approved by Probation, Mr. Pena may  
24 leave for religious observances. However, before Probation  
25 exercises that authority, it will have to consult me and get my

1 approval. It's only in circumstances where in effect religious  
2 places, churches, have been reopened. I expect that there will  
3 be no departures approved while the pandemic restricts large  
4 assemblies. And if there's another purpose, like a court  
5 appearance approved by me or ordered by me, that would be an  
6 exception to the home confinement.

7 The existing conditions of supervised release will  
8 also continue. Among other things, Mr. Pena is ordered to pay  
9 restitution of \$2,500,000, and he must provide Probation with  
10:03 10 any requested financial information. The U.S. Attorney's  
11 Office may make requests to Probation. Probation shall  
12 communicate those requests to Mr. Pena, or, if it's believed  
13 that the requests are unreasonable, seek guidance from me.  
14 Probation shall develop a payment plan for restitution. That  
15 may include an initial lump sum payment, particularly if  
16 Mr. Pena has equity in the family home. I don't recall if it's  
17 now in his name. It may not even be reflected on the financial  
18 statement. But if his name is not on the home, I would like  
19 Probation to determine whether it ever was on the home and, if  
12:04 20 so, when it was removed. It's possible there's equity in the  
21 home that could be made available for some lump sum payment  
22 soon through a refinancing, if necessary.

23 As I said, I will issue a short order memorializing  
24 these conclusions. You must order -- the parties must order  
25 the transcript on the most expedited basis. Perhaps we'll have

1 it by Monday. And when I say "the transcript," I mean the  
2 transcript of today.

3 The defendant shall inform the First Circuit of my  
4 ruling and request the remand. The deputy clerk will also  
5 communicate this to the First Circuit. If and when the case is  
6 remanded to this court, the Bureau of Prisons shall test  
7 Mr. Pena again for the COVID-19 virus. If he again tests  
8 negative, I will order his immediate release.

9 Is there anything further in this matter for today?

12:05 10 MR. LAMACCHIA: Your Honor, I had two small matters,  
11 one a point of clarification, the other just a housekeeping  
12 matter. The point of clarification is, I've looked back at  
13 Mr. Pena's standard conditions of supervision that you ordered,  
14 and condition seven discusses he must work full time.

15 THE COURT: Hold on just one second. Let me get it.  
16 You're looking at the conditions of supervised  
17 release?

18 MR. LAMACCHIA: Correct. Seven in particular, number  
19 seven.

12:06 20 THE COURT: About working full time?

21 MR. LAMACCHIA: Correct.

22 THE COURT: That's removed.

23 MR. LAMACCHIA: But I'd ask that it be left in there  
24 for now. And I mean, you can advise Probation, however, that  
25 it wouldn't be imposed while he's on home confinement. The

1 reason for that is -- there's a couple of reasons. One is the  
2 circumstances of the pandemic and things could change,  
3 obviously, during the course of Mr. Pena's supervised release.  
4 The other thing I understand just from the limited information  
5 we have in terms of his financials is that he rents the house,  
6 so I don't know that he has any ownership interest in it. The  
7 other thing is that he's on Social Security retirement. So  
8 there's very limited money that could be put toward restitution  
9 unless he is made to find some --

12:07 10 THE COURT: Okay. So you want number seven to stay  
11 in, and if he's able to find employment and work from home, he  
12 shall do so.

13 MR. LAMACCHIA: Correct.

14 THE COURT: Okay. We'll leave it in.

15 MR. LAMACCHIA: Okay. Thank you.

16 The other just housekeeping matter was this was  
17 brought up at the May 13 hearing. There was discussion at  
18 various points about a particular staff member's health and  
19 test results. And it was discussed in such a way that that  
12:07 20 person could be identified, and Attorney Scannell from the  
21 Bureau of Prisons asked that Mr. Pena be ordered not to  
22 disclose that to folks at the institution. And I talked to  
23 Attorney Katz, and I don't think he has any objection to that.

24 And then the other part is I also proposed some very  
25 minor redactions to the transcript, which I also provided to

1 Attorney Katz, and he is fine with those. They're just  
2 designed to prevent those people reviewing the transcript to  
3 identify who that person is, either by his title, because  
4 there's very few people with that title --

5 THE COURT: Here. Let me see. Let's do these one at  
6 a time. So the warden identified a staff -- who did he  
7 identify?

8 MR. LAMACCHIA: He identified a particular staff  
9 member who was at the camp that tested negative, but he used --  
10 at times during the hearing the person was identified by name  
11 but also identified by position, and that particular position,  
12 there's very few people in that position.

13 THE COURT: Well, if the person tested negative,  
14 what's the issue?

15 MR. LAMACCHIA: Well, I don't think that person  
16 consented to their personal identifying information being made  
17 public in a transcript. That's my concern, Your Honor. And  
18 the redactions we proposed, and obviously I can file them and  
19 Your Honor can review them, they don't in my view change the  
12:09 20 substance. It's clear what's going on. They're very narrow.  
21 We're talking about portions of a sentence or a name or  
22 something like that that just --

23 THE COURT: Well, those are the redactions. What's  
24 your position on the redactions, Mr. Katz?

25 MR. KATZ: I don't have an objection, Your Honor.



1 THE COURT: All right. How quickly can you file them?  
2 I don't think I've seen -- I've seen a draft of the transcript.  
3 Do you have a final transcript?

4 MR. LAMACCHIA: I don't know whether it's final or  
5 not. I thought it was final because it was emailed to me last  
6 night. So if that's correct, I can file the proposed  
7 redactions today.

8 THE COURT: Well, I think you should file them, even  
9 if it's not the final. File it immediately after this hearing  
10 and point out what pages they're on.

11 MR. LAMACCHIA: I mean, what I intended to do is I  
12 will be attaching the transcript pages as I propose redacting  
13 them.

14 THE COURT: Okay. So they'd be numbered. But I want  
15 to make sure we have the same transcript you have. Let me ask  
16 Ms. Loret.

17 COURTROOM CLERK: We have the final.

18 THE COURT: We have the final. But it hasn't been  
19 docketed yet?

12:10 20 COURTROOM CLERK: I believe it has been. One moment.

21 MS. GRIFFITH: It has been, and I sent it to you.

22 THE COURT: Well, send the proposed redactions. If  
23 there's no objection, they may be permissible. Now, you want  
24 an order that Mr. Pena not tell anybody else that a particular  
25 person was tested?

1 MR. LAMACCHIA: That is correct. And the reason for  
2 that is, you know, it's the same concern with respect to the  
3 redactions. If Mr. Pena tells someone at the camp, that will  
4 spread, and again, it's just a person's health identifier  
5 information that was asked not to be exposed.

6 THE COURT: Mr. Katz, what's your view on that?

7 MR. KATZ: Your Honor, I told Mr. LaMacchia, we don't  
8 have an objection. And Mr. Pena is not interested in spreading  
9 the information. So I mean, I don't have an objection. I  
10 don't know that an order is really necessary. But at the end  
11 of the day, I think it's six of one, half dozen of the other.

12 THE COURT: Well, I haven't issued such an order, and  
13 I don't issue orders I don't intend to enforce. And I don't  
14 know if Mr. Pena has already told somebody or --

15 MR. KATZ: I've discussed it with him. I guess I have  
16 not discussed it with him -- we talked about that he shouldn't  
17 share the information.

18 THE COURT: Mr. Pena, are you there?

19 THE DEFENDANT: Yes, Your Honor.

12:12 20 THE COURT: Do you promise that the answers you're  
21 about to give me will be the truth, the whole truth and nothing  
22 but the truth, so help you God?

23 THE DEFENDANT: Yes, Your Honor.

24 THE COURT: Have you disclosed to anybody the name of  
25 the person, the staff member who tested positive? And I didn't

1 order you not to.

2 MR. LAMACCHIA: Negative.

3 THE COURT: Tested negative. I misspoke. Have you  
4 disclosed to anybody at Devens the name of the person who  
5 tested negative?

6 THE DEFENDANT: I have not disclosed that name.

7 THE COURT: Okay. Have you described the person by  
8 position to anyone at Devens?

9 THE DEFENDANT: I have not described the person by  
10 position or name, Your Honor.

11 THE COURT: All right.

12 THE DEFENDANT: Can I add something, though?

13 THE COURT: Yes.

14 THE DEFENDANT: This is a very small place, and I'm  
15 hoping that nobody else has because, if anybody else has,  
16 there's 110 or so people in this building, and obviously some  
17 of the staff members may know this, so I don't have any control  
18 over that. But I have not, I can testify clearly that I was  
19 not. I was asked by Mr. -- the gentleman not to do that, and I  
12:14 20 gave my word then that I would not and I have not done that.

21 THE COURT: All right. I'm not going to issue a  
22 separate order, but if something is redacted, it's not on the  
23 public record. And that means none of you should be disclosing  
24 it to anybody other than the attorneys who are the participants  
25 in this case. There are people who heard this on Wednesday

1 when nothing -- the proceeding wasn't closed.

2 But Mr. LaMacchia, I'm not going to issue the order  
3 based on what I know now. I am going to authorize the  
4 redactions. And, you know, there are people on the line  
5 including I think some lawyers in other cases. And the  
6 District Court is constantly, every week, sort of reviewing  
7 public access to hearings, whether they should be by video,  
8 whether they should be by audio, whether they should be at all.  
9 And I fully understand that, unless there's good reasons, that  
10 there's public access to judicial proceedings. And I and my  
11 colleagues don't want to see that principle eroded at this  
12 time. And indeed lawyers in other cases may be concerned about  
13 the privacy of information concerning their clients.

14 So I'm not issuing any orders, but, you know,  
15 redacting personal information about public health, about a  
16 person's health is permissible under *Kravetz*, among other  
17 cases. I think redaction is appropriate in part because of  
18 what Mr. Pena said. There are a lot of people that this  
19 information, if it gets out in the camp, I don't want to --  
12:16 20 based on what I know now -- start contempt proceedings. But if  
21 you think that there's a violation of the sealing, which is  
22 what a redaction is, Mr. LaMacchia, you can come back to me.  
23 Okay?

24 MR. LAMACCHIA: Okay. Thank you, Your Honor.

25 THE COURT: Anything else for today?

1 MR. KATZ: Not for Mr. Pena, Your Honor.

2 THE COURT: All right.

3 MR. LAMACCHIA: No.

4 THE COURT: So Mr. Katz, there will be a written order  
5 today that memorializes this, and then you, under the rule,  
6 have responsibility for telling the First Circuit. There's a  
7 good chance I'll have the transcript of what I said today by  
8 Monday.

9 MR. KATZ: Whenever there is an order, I will file  
10 something with the First Circuit immediately.

11 THE COURT: Okay. Well, it will be soon.

12 MR. KATZ: Okay.

13 THE COURT: All right. I've said it before, but the  
14 adversary process has operated at a very high level in this  
15 matter. I think you've educated me to understand some things  
16 that I -- Mr. LaMacchia pointed them out right at the outset on  
17 Wednesday, the distinctions between the home confinement  
18 statute and the reduction in sentence statute and the different  
19 policies and directions to Bureau of Prisons personnel that  
12:18 20 apply to each. So hopefully all of this work will not just  
21 facilitate an informed decision in Mr. Pena's case but promote  
22 at least better understanding in some other cases.

23 All right. Court is in recess. I'm going to ask my  
24 staff, though, to stay on the line.

25 (Recess, 12:18 p.m.)

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CERTIFICATE OF OFFICIAL REPORTER

I, Kelly Mortellite, Registered Merit Reporter and Certified Realtime Reporter, in and for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing transcript is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter to the best of my skill and ability.

Dated this 17th day of May, 2020.

/s/ Kelly Mortellite

\_\_\_\_\_  
Kelly Mortellite, RMR, CRR

Official Court Reporter