Federal Defenders
OF NEW YORK, INC.

One Pierrepont Plaza-16th Floor, Brooklyn, NY 11201
Tel: (718) 330-1200 Fax: (718) 855-0760

David E. Patton
Executive Director and
Attorney-in-Chief

Deirdre D. von Dornum
Attorney-in-Charge

April 27, 2020

By ECF and EMAIL to Chambers
Honorable Sterling Johnson, Jr.
Senior United States District Court Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: USA v. Cirilo Cohetero, 19-606 (SJ)
Proposed Findings for Remote Sentencing Proceedings Scheduled for April 30, 2020 Sentencing Date

Your Honor:

I respectfully offer the Proposed Findings for the remote proceeding planned for April 30, 2020, for purposes of satisfying the CARES Act and Admin. Order 2020-13 standard. Specifically, the Court could choose from any one of the following to support a finding that to delay the sentencing in this case until the courts reopen would do "serious harm to the interests of justice."

PROPOSED FINDINGS FOR REMOTE TELESENTENCE

- Defendant herein is charged with a non-violent offense with no mandatory minimum, he has pleaded guilty, the PSR is complete and the parties have fully briefed the disputed guideline range;[1]
- Defendant herein has consented to the remote procedure, as counsel and her client confirmed on April 21, 2020;
- Defendant herein was noticed in the PSR of the April 30, 2020 sentencing date, and was told at the April 21, 2020 remote appearance that the sentencing date was April 30;
- Defendant herein is a vulnerable inmate at the MDC due to preexisting diabetes and high blood pressure, and was hospitalized prior to his incarceration;[2]
- Defendant herein will not be released to the community as there is an ICE detainer for his deportation to Mexico and Defendant could remain in ICE custody for an uncertain amount of time awaiting deportations as ICE facilities have experienced delays and disruptions during the COVID-19 pandemic;

1 ECF 16, 18, 19 (sentencing submissions by parties).
2 PSR, ¶ 48

- Defendant herein is incarcerated at the MDC, which is among the BOP hotspots[3] for the spread of COVID-19, and is within the NYC community, which is itself considered the world's epicenter of the pandemic;[4]
- Defendant here would suffer needless emotional harm from the uncertainty of his sentencing fate if forced to await court reopening;[5]
- Defendant herein would suffer needless exposure to unacceptable pretrial detention conditions at the MDC which include complete lockdown, denial of social visits, unpredictable commissary availability for self-care, limited access to counsel, sanitation, and medical care. *See, e.g.*, *Federal Defenders v. BOP*, No. 19-1778, 2020 WL 1320885 (2d Cir. Mar. 20, 2020).
- Defendant herein will be exposed to potential prison violence if sentencing were delayed, as he would be among the few remaining non-violent offenders at the MDC; most inmates who do not present a danger to the community have been released on bond based on the COVID-19 pandemic.

The Government has an interest in making sure defendants incarcerated during the COVID-19 pandemic are expeditiously processed, for reasons explained in its letter to the Court in *U.S. v. Crowder,* 18 CR 885 (SDNY) (GHW):

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3 Data obtained from www.bop.gov/coronavirus and from https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html:

COVID-19 Rate of Infection for Various Populations

Location	Cases	Population	Infection Rate as Percent of Population	Infections/ 1,000 People
BOP Population	1,118[7]	178,654[8]	6.26	0.6258%
United States	957,016[9]	329,569,811[10]	2.90	0.2904%
China	83,9019[11]	1,394,015,977[12]	0.06	0.0060%
Italy	197,675[13]	62,402,659[14]	3.17	0.3168%

Cumulative Rise in Known Infection Rate – BOP Compared to U.S.

Date	Number of BOP Cases	Cumulative BOP Rate of Rise Since 3/20/2020	Number of National Cases	Cumulative U.S. Rate of Rise Since 3/20/2020
3/20/2020	2	0.00%	18,747	0.00%
3/23/2020	6	200.00%	44,183	135.68%
3/26/2020	18	400.00%	85,356	228.87%
3/29/2020	38	511.11%	140904	293.95%
4/1/2020	94	658.48%	213144	345.21%
4/4/2020	174	743.59%	304826	388.23%
4/7/2020	313	823.47%	395011	417.81%
4/10/2020	481	877.15%	492,416	442.47%
4/13/2020	589	899.60%	579,005	460.06%
4/16/2020	752	927.27%	661,712	474.34%
4/19/2020	804	934.19%	746,625	487.17%
4/22/2020	977	955.70%	828,441	498.13%

4 It is of growing concerns is that jails and prisons are becoming the key vectors of community transmission in the United States. ***Coronavirus may kill 100,000 more Americans than projected unless jailed populations are 'immediately' reduced: study,*** https://www.nydailynews.com/coronavirus/ny-mass-incarceration-could-double-coronavirus-death-toll-aclu-study-20200422-tiasjskgyjclhiswqems4wloea-story.html. BOP employees are pushing back. *See* OSHA Complaint to U.S. Department of Labor by BOP Employee's Union counsel:

> As a matter of record, this complaint is elevated to and considered an *Imminent Danger Report*, pursuant to OSHA of 1970, Executive Order 12196, 29 CFR 1960.8, Agency's Responsibilities, BOP Program Statement 1600.011. The [BOP's] actions described herein are proliferating the spread of a known and deadly contagion both within our prison system and to our surrounding communities. The agency's actions and inactions are expected to result in death and severe health complications and/or possible life-long disabilities.
>
> OSHA Complaint attached as Exhibit B.

5 It could easily be as long as another year or two even before things get "back to normal." Robert Kuznia, "The timetable for a coronavirus vaccine is 18 months. Experts say that's risky," *CNN Investigates* (April 1, 2020), https://www.cnn.com/2020/03/31/us/coronavirus-vaccine-timetable-concerns-experts-invs/index.html; *see also* Donald G. McNeil Jr., "The Coronavirus in America: The Year Ahead," *The New York Times* (Published April 18, 2020; Updated April 20, 2020).

> In short, were it not for the circumstances relating to the COVID-19 pandemic and the defendant's placement on the MCC's list of defendants particularly susceptible to that virus, the Government would be seeking a sentence at the top of the applicable Guidelines range (four to ten months). As it stands, the Government submits that it would be more than appropriate for the defendant to serve a portion of any term of supervised release on home confinement, principally due to the present offense and his criminal history. Additionally, to the extent the defendant has been exposed to COVID-19 at the MCC, including in any term of supervised release a period of home confinement also would serve the public health interest by minimizing individuals with whom the defendant would come in contact, should the Court decide to release him.

18 CR 885 (GBW), ECF Dkt. 32.

Courts in the EDNY and SDNY have been routinely bailing defendants previously considered unbailable, issuing orders of compassionate release, and conducting remote sentencings for defendants detained in the MCC and MDC during the COVID-19 crisis, sometimes even waiving presentence investigations. I will spare the Court the citations outlining the unprecedented number of compassionate release and bail orders, and cite only some example remote sentencings. *See, e.g., U.S. v. Delby Vinas,* 20-CR-44 (EDNY) (EK) (remote sentencing in escape case and court ordered remote sentence even though guidelines were higher than the time defendant had served); *U.S. v. Melesia Juarez-Garcia*, 10 CR 1130, ECF Dkt. 8 (SDNY) (CS) (remote sentencing with Government indicating that if video or teleconferencing could be made available earlier it would "inform defense counsel and the Court, in the hope of rescheduling the plea and sentencing for an earlier date."); *U.S. v. Jorge Luis Umana Mejia*, 20 CR 251, ECF Dkt. 6 (SDNY) (PMH) (remote plea and sentencing for illegal reentry defendant, court waives Presentence Report pursuant to Rule 32(c)(1)(A)(ii)); *U.S. v. Cesar Rossis-Pascal,* 19 CR 917 (SDNY) (RA) (remote sentencing in False Statement case, and Government agreement to dismiss Aggravated Identity Theft count and to waive PSI); *U.S. v. Eduardo Ortiz-Dominguez*, 18 CR 149 (EDNY) (RJD) (remote and expedited sentencing in Illegal Reentry violation case where defendant had been twice convicted of illegal reentry and was being sentenced for violating terms of supervised release by reentering); *U.S. v. FNU LNU,* 19 CR 688 (SDNY) (VSB) (remote and expedited sentencing proceeding for defendant charged with false statement; Government agrees to file its sentencing submission early to expedite the case).

The only district outlier case is *U.S. v. Harry*, No. 19-CR-535, 2020 WL 1528000, at *2 (E.D.N.Y. Mar. 31, 2020) (Irizarry, J). There, Judge Irizarry indicated that an in-person conference would be important for the Defendant because she otherwise was not persuaded by defense counsel that "time served" was the appropriate sentence. She viewed delay as giving the Defendant *a chance* to persuade her why a lower sentence was appropriate at in-person proceeding – so there was no harm to the Defendant occasioned by the delay.

CONCLUSION

For the reasons stated above, we ask the Court to choose any of the proposed findings offered herein in order to justify the remote appearance on April 30, 2020.

We also respectfully request that the Court sign the attached Proposed Order so that the MDC can provide two phones – one for the Interpeter's Office and one for the Defendant. This procedure was used in other cases and *U.S. v. Gabriel Ortiz-Sosa,* 18 CR 378 (ENV), with a similar proposed order used.

Thank You for Your attention to this matter.

Respectfully Submitted,

Jan Rostal

Jan A. Rostal, Esq

Enc. (Proposed Order)
cc: AUSA Michael Gibaldi (by email)
Defendant (regular mail)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X
UNITED STATES OF AMERICA :

-against- :

Cirilio Cohetero, :

Defendant. :

----------X

ORDER
19 CR 606 (SJ)

WHEREAS the Court has scheduled a sentencing conference for Cirilio Cohetero (Inmate #45163-359) for 9:30 a.m. on APRIL 30, 2020;

WHEREAS the Court, pursuant to §15002(b)(2) of the CARES Act and to Administrative Order No. 2020-13, ¶2 (March 30, 2020), finds that the sentencing proceeding may go forward by TELECONFERENCE, with the Defendant to remain at the MDC;

WHEREAS the Court is informed that the Defendant requires a Spanish interpreter,

WHEREAS the Court has determined that the telephone conference would be by simultaneous rather than consecutive interpreting, the MDC should make available to Defendant two (2) telephone lines, one for the connection to the Court and the other for connection to the Interpreter's Office; therefore

IT IS HEREBY ORDERED that the Metropolitan Detention Center provide the Defendant, Cirilio Cohetero (Inmate #45163-359), two (2) telephone lines for the teleconference at 9:30 a.m. on April 30, 2020.

DATED: APRIL _____, 2020
BROOKLYN, N.Y.

_____

THE HON. STERLING JOHNSON, JR.
Senior United States District Judge
Eastern District of New York

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OF NEW YORK, INC.

One Pierrepont Plaza-16th Floor, Brooklyn, NY 11201
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David E. Patton
Executive Director and
Attorney-in-Chief

Deirdre D. von Dornum
Attorney-in-Charge

April 24, 2020

By ECF and Email to Chambers
The Hon. Carol B. Amon
Senior United States District Judge
Eastern District of New York
Brooklyn, New York 11201

RE: United States v. Junny Torices-Maldonado, 18 CR 308 (CBA)

Your Honor:

On behalf of my client, I respectfully object to the Court's Order, ECF 149, that "the presentence interview shall take place over the telephone." With respect, the Court lacks the legal authority to issue such an order, and I ask that the Court issue a revised order delaying the presentence interview proceeding until the Probation Office reopens, as is required under Rules 32 and 43.

Background

On April 10, 2020, the Probation Department sent the Court a memo advising as follows:

> The Probation Department's physical offices are currently closed due to the COVID-19 pandemic and Defense Counsel has declined to participate in a telephone interview. A telephone interview is preferred by the Probation Department because the defendant requires an interpreter and the interpreter's office has advised that they are only using telephone conference calls to assist in translating. A single mode of communication is preferred by the Probation Department and we do not see a compelling need to conduct the interview via videoconference, with an interpreter on a separate telephone call. As a result, the Probation Department respectfully requests both a delay in the PSR disclosure date, and a directive from the Court to either order the presentence interview to be done via telephone, or delayed until the Probation Department office reopens, or another option as the Court sees fit.

USPO, April 10, 2020 Memo.

This defendant is not in custody and has religiously abided by his release conditions for the past two years and through two criminal trials. His current situation is dire. He and his

wife and children have been living in poverty, but at least the wife was working. When the COVID-19 pandemic struck she was laid off. Now without income, the family (with three children) faces eviction soon. Their phones are not smart phones and they do not have data plans for video calls. The conversations are difficult to understand and follow because of the phones and the language barrier. Even with an interpreter this is a cumbersome process prone to misunderstandings and inaccuracies. I also learned this week that client and wife both had COVID-19 symptoms and when they tried to go the hospital there was no space for them. They are weathering out in their tiny apartment. Because they have no money for food Mr. Maldonado has been forced to wait in line at the food pantry – yesterday the pantry ran out of food and they went without. Their situation sounds devastating.

There is much at stake here in getting the sentencing facts right for Mr. Maldonado during his presentence interview. I am not opposed to phone interviews or video interviews in general, but I am unwilling *in this particular case* to sacrifice the thoroughness and accuracy of an in-person interview. There is simply no basis here to resort to emergency alternatives to in-person proceedings. No lawyer worth her salt would consent to it.

More importantly, the law does not permit the Court to forcibly expedite critical sentencing proceedings or to order the defendant to participate in a 4-way telephone interview, with his counsel, an interpreter, and the probation officer all in different places, with no ability of counsel to consult with her client during the process.

We therefore respectfully submit that the presentence interview contemplated by Rule 32(c)(2) interview should be delayed until it can take place in person.

The Federal Rules Require Rule 32 Sentencing Proceedings to be Conducted In-Person Absent a Finding that Delay Would Result in "Serious Harm."

We begin with Rule 43, which *requires* a defendant's physical presence at all but a chosen few proceedings not implicated here. This includes sentencing proceedings pursuant to Rule 32, of which the Presentence Investigation is a critical part.

Pursuant to Section 15002(b)(2) of the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"), Pub. L. No. 116-136, and Chief Judge Mauskopf's Administrative Order 2020-13 ("Admin. Order 2020-13"), "felony sentencings under Rule 32 of the Federal Rules of Criminal Procedure cannot be conducted in person without jeopardizing public health and safety." Admin. Order 2020-13 ¶ 2. The obvious intent of Admin. Order 2020-13 was to balance the interest in speedy dispositions against the public health threat. Recognizing that video or telephone conferences were a poor, but occasionally necessary, alternative, the Order proceeds to permit an exception:

> Felony sentencings may be conducted by video or telephone conference, only **(1) with the defendant's consent and (2) "if judges in individual cases find, for specific reasons, that felony . . . sentencings in those cases cannot be further delayed without serious harm to the interests of justice.**

Id. (emphasis added).

Three courts in the Eastern District of New York, and a scattered few elsewhere, have found that the "serious harm to justice" standard cannot be met in order to expeditiously substitute remote proceedings for in-person -- even where the defense argued that "time-served" was a possibility for an incarcerated defendant. In these cases, the courts have agreed with the Government's position *opposing* the expedited remote proceedings procedure outlined in Admin. Order 2020-13. *United States v. Oscar Vasquez-Reyes*, 19 CR 0550 (RJD) (denying defense request for expedited remote sentencing in illegal reentry case); *United States v. Cirilio Cohetero*, 19 CR 606 (SJ), ECF Dkt 20 (same but scheduling it 9 days later).

The issue was thoroughly discussed by Judge Irizarry in a published opinion, *United States v. Harry*, No. 19-CR-535, 2020 WL 1528000, at *2 (E.D.N.Y. Mar. 31, 2020) (Irizarry, J.). The court held in that case that the MDC COVID-19 risk of infection and mere eligibility for a time-served sentence was insufficient to demonstrate the "serious harm to justice" that would result from delay for an in-person appearance. *Id.* In her opinion, Judge Irizarry court details the importance of a defendant's "due process right to be present at all stages of a criminal case, especially at sentencing." *Id.* This is because

> [c]riminal punishment impacts the most fundamental of human rights, liberty, and there are many important policy reasons why the physical presence of the defendant at sentencing is critically important: to insure the defendant has the opportunity to (1) challenge the accuracy of the information upon which the court is relying; (2) present any mitigating evidence he may have: and (3) make a personal statement. Of equal importance, defendant is entitled to the effective assistance of counsel under the Sixth Amendment to the Constitution, a right that is difficult to give any meaningful adherence to if defendant and defense counsel are not together in the same place at the same time.

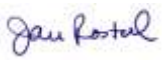
Id. The *Harry* decision further relies upon Fed. R. of Crim. P. 43, which of course *forbids* sentencing proceedings via videoconferencing or teleconferencing, even *with* the consent of the parties. *Id.* Similarly, FRCP 32(c)(2) requires that a probation interview be conducted with a defendant only if the "defendant's attorney . . . [has] notice and a reasonable opportunity to *attend* the interview." FRCP 32(c)(2) (emphasis added). The substitution of a remote proceeding to bypass this requirement requires a finding that the interview cannot be "further delayed [to await in person proceedings] without serious harm to the interests of justice." Admin. Order 2020-13.

There is no basis in this record for such a finding and in fact, if there were an evidentiary hearing on the matter, the facts would support the opposite conclusion – that it would do serious harm to the interests of justice to force remote sentencing proceedings here.

We therefore respectfully submit that the Court order that Rule 32 proceedings in this matter be delayed until the public health and safety restrictions set forth in Admin. Order 2020-13 ¶ 2 are lifted.

Thank You for Your continued attention to this matter.

Respectfully Submitted,



JAN A. ROSTAL, ESQ.

cc: Andrew Grubin, Esq. (AUSA)

Federal Defenders
OF NEW YORK, INC.

One Pierrepont Plaza-16th Floor, Brooklyn, NY 11201
Tel: (718) 330-1200 Fax: (718) 855-0760

David E. Patton
Executive Director and Attorney-in-Chief

Deirdre D. von Dornum
Attorney-in-Charge

April 22, 2020

The Honorable Raymond J. Dearie
United States District Judge
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, N.Y. 11201

U.S.A. v. Oscar Vasquez-Reyes, 19 CR 0550 (RJD)

Your Honor:

Preliminary Statement

I move that the Court reconsider its Order of April 20, 2020, denying the defense motion for a remote sentencing of my client, Mr. Oscar Vasquez-Reyes, on some date between May 1 and 5. The Order states that the Court "decline[s] remote sentencing at this time largely for the reasons stated in the government's letter in opposition." Since the Court entered the Order only hours after the government had submitted its opposition letter, I did not have time to reply and address issues that the government raised in its letter for the first time. I make that reply in the present submission.[1]

Background for the Present Motion for Reconsideration

One critical circumstance for determining whether a sentence in this illegal reentry case "cannot be further delayed without serious harm to the interests of justice," Chief Judge Roslynn R. Mauskopf's Administrative Order No. 2020-13, ¶2 (March 30, 2020), is the present advisory Guidelines calculations. As the government agrees, Mr. Vasquez faces a total offense level of 10 and a criminal history category of II (PSR, ¶60; Gvt. L., at 4). On the Sentencing Table, that calculation yields an imprisonment range of 8-14 months and falls into Zone B. The minimum term for this Guidelines range "may be satisfied by . . .a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention . . . , provided that at least one month is satisfied by imprisonment . . . . " U.S.S.G. §5C1.1(c)(2).

Mr. Vasquez, who was arrested on November 14, 2019 (PSR, p. 1), has now spent more than 5 months in custody. Thus, the Court could already craft a Guidelines sentence, pursuant to

[1] The present submission refers to the Presentence Report ("PSR"); the plea agreement between the parties, executed on January 2, 2020 ("Plea Agr."); and an Affidavit of Brie Williams, M.D., of March 27, 2020 ("Williams Aff."); with the latter two attached as exhibits. This submission abbreviates the Bureau of Prisons ("BOP"); Federal Correctional Institution ("FCI"); Immigration and Customs Enforcement ("ICE"); and Metropolitan Detention Center ("MDC").

Guideline §5C1.1(c)(2), that is effectively time served. In the alternative, as the defense has requested, the Court could make a modest downward departure or variance from 8 to 5 months.

At the moment, a remote proceeding is the only way for the Court to impose sentence.

ARGUMENT

I.

THE COURT SHOULD EXPEDITIOUSLY SENTENCE MR. VASQUEZ REMOTELY AS A MATTER OF DUE PROCESS

Mr. Vasquez has the right to make arguments that can make a real difference in his actual sentence in the course of an adversarial proceeding. He has asked for a sentence of time served. The government opposes that sentence (*see* Gvt. L., at 3-5). An adjournment until July 2, as the Court has ordered, is effectively a partial sentencing decision. But the Court should render its decision about whether to impose a sentence of time served not through a ministerial adjournment but rather through an adversarial process in which the defense can make its points in both writing and oral argument. Thus, in the present circumstances an adjournment of sentencing rather than an expeditious remote sentencing is a denial of due process. *See generally Betterman v. Montana*, 136 S. Ct. 1609, 1617-18 (between conviction and sentencing, the "primary safeguard [against undue delay] comes from statutes and rules"; "due process serves as a backdrop against exorbitant delay"; and the defendant, whose "due process right to liberty" remains, "retains an interest in a sentencing proceeding that is fundamentally fair."); *see also* Fed.R.Crim.P. 32(b)(1)(" The court must impose sentence without unnecessary delay.")

This denial of due process is especially clear in light of a reasonable prediction. The Order reschedules sentencing for "7/2/2020 at 10:00 AM in Courtroom 10A South . . . . " The underlying assumption is that life will revert to normal in 2 ½ months and that in-person courtroom proceedings will resume like in the good old days. Unfortunately, that assumption is unwarranted. A resumption of normal life is unlikely before the development and distribution of a vaccine against the coronavirus, and medical experts have predicted that such development and distribution will not take place for at least 12-18 months.[2] In the meantime, there may be some attempted adjustments, with select masked litigants hazarding trips into eerily empty courtrooms. But many, like me, fall into risk categories that make it unlikely that they will muster the courage – or be so reckless – to venture forth. Thus a reasonable prediction is that remote proceedings will remain the only viable option for sentencings for the foreseeable future, probably for the rest of this calendar year, and certainly beyond the summer. If so, a sentencing adjournment until early July serves no purpose.

In short, since an expeditious remote sentencing is necessary for due process, the Court should schedule one between May 1 and 5.

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[2] Robert Kuznia, "The timetable for a coronavirus vaccine is 18 months. Experts say that's risky," *CNN Investigates* (April 1, 2020), https://www.cnn.com/2020/03/31/us/coronavirus-vaccine-timetable-concerns-experts-invs/index.html; *see also* Donald G. McNeil Jr., "The Coronavirus in America: The Year Ahead," *The New York Times* (Published April 18, 2020; Updated April 20, 2020).

II.

THE GOVERNMENT HAS BREACHED ITS PLEA AGREEMENT, AND THE ONLY MEANINGFUL REMEDY IS AN EXPEDITIOUS REMOTE SENTENCING

The Court must strictly construe plea agreements against the government, *U.S. v. Vaval*, 404 F.3d 144, 152 (2d Cir. 2005)(courts must "construe plea agreements strictly against the government and . . . not hesitate to scrutinize the government's conduct to ensure that it comports with the highest standard of fairness."); and resolve any ambiguities in the defendant's favor. *U.S. v. Griffin*, 510 F.3d 354, 360 (2d Cir. 2007)("the government must take particular care in fulfilling its responsibilities," with a plea agreement, and "any ambiguities in the agreement must be resolved in favor of the defendant."). Here the parties entered a plea agreement that stated, in relevant part, that the government will "take no position concerning where within the Guidelines range determined by the Court the sentence should fall . . . . " (Plea Agr., ¶5.b.) As mentioned above, the Guidelines range is the 8-14 months reflected on the Sentencing Table as well as the 1 month imprisonment plus supervised release conditioned on community confinement or home detention that Zone B includes (*see* Backg'd *supra*). Despite this Guidelines range and its promise to keep to it, the government asks for a sentence of at least 8 months (*see* Gvt. L., at 3-5).

The government cannot evade its breach of the plea agreement by invoking Probation's opinion that 1 month imprisonment coupled with 7 months community confinement or home detention is not "a viable option for a defendant with a detention hold and no legal presence in the United States." (*See* PSR, ¶60.) As a matter of law, neither the Guideline §5C1.1(c)(2) nor its "Commentary" nor the Guideline §2L1.2 (used here for the actual Guidelines calculation) carve out an exception for illegal reentry cases. As a matter of viability, the Zone B option is practical. The Court could impose a sentence of 1 month coupled with 7 months community confinement, deemed satisfied by time in both BOP and ICE custody. Furthermore, the Court could impose a sentence that includes home confinement since a former law student who had interned at Federal Defenders (and fled the city for hopefully safer environs) has made her apartment in Brooklyn available for a released inmate.

In a plea agreement on a single count Indictment, Mr. Vasquez gave up many rights and in return got one concrete benefit: the government's promise not to argue against the Guidelines that apply to him. Yet that lone benefit is precisely what the government has tried to thwart. For the government's breach, Mr. Vasquez merits a remedy. *See U.S. v. Vaval*, 404 F.3d 144, 156 (2d Cir. 2005)(a remedy is necessary where "the government violated essential provisions of the plea agreement," such as where the "promise[] not . . . to argue where to sentence appellant within his Guidelines range [was] . . . unquestionably the centerpiece of the agreement."); *see also U.S. v. Griffin*, 510 F.3d 354, 367 (2d Cir. 2007)("The appropriate remedy for a breach of a plea agreement is either to permit the plea to be withdrawn or to order specific performance of the agreement."). The only remedy, which is not *pro forma*, which gives Mr. Vasquez the benefit of his bargain, which does not allow the government to take back the little that it had given, is an expeditious remote sentencing.

In short, the government has violated the plea agreement rather than having met its obligation to uphold the highest standards of fairness, and the only meaningful remedy is an expeditious remote sentencing.

III.

THE ONLY WAY TO DETERMINE THE SENTENCING WEIGHT TO GIVE MR. VASQUEZ'S RISK OF CONTRACTING COVID-19 IN THE MDC IS AN EXPEDITIOUS REMOTE SENTENCING

As COVID-19, the worst disease outbreak in a century, sweeps through the world, afflicting adults of all ages; leapfrogging from both people who are coughing and fevered and those who are asymptomatic; sickening people who have preexisting conditions and those who do not; piercing neighborhoods with the screeching of ambulance sirens; killing proportionately more people than other widespread illnesses; closing down countries; prompting state officials to urge everyone, including the healthy, to shelter in place; burrowing into and then devastating closed communities, from military aircraft carriers to cruise ships to nursing homes – as all this happens and more, the government takes Mr. Vasquez's prison confinement in stride. The government states that COVID-19 at the MDC is "not a basis for a finding of serious harm." (Gvt. L., at 2.)

What kind of harm, then, is it? The prison, like an aircraft carrier, cruise ship, and nursing home, is an enclosed space with many people crammed together. Social distancing is not possible. Sanitary conditions at the MDC – as anyone knows who has spent time in its historically filthy visiting rooms, who has toured it and seen the stuffed, unflushed, nonworking toilets, and who has listened to the despairing accounts from its inmates – are disgusting. Is the high risk of exposure to a highly infectious and serious disease "not a basis for a finding of serious harm?" Must the inmate live in terror until he is infected? Is that the moment of "serious harm?" Or, if infected, must he then await the course of his illness, in nail-biting suspense whether he will leave in a body bag? Is that the moment? Must we await a post-mortem investigation for why that happened? Lest the government claim defense exaggeration, ask the relatives of the nursing home victims.

The COVID-19 pandemic has rendered the conditions at the MDC harsher than ever. Even during normal times, the MDC provides inmates with little access to fresh air or sunlight, and they leave the building only for court appearances. But since March 13, there have been no legal visits, and since April 1, the institution has been on lockdown.

Conditions of detention, such as at the MDC, are unfortunately ideal for the transmission of contagious disease.[3] According to public health experts, incarcerated individuals "are at special risk of infection, given their living situations," and "may also be less able to participate in proactive measures to keep themselves safe . . . "[4] These risks are particularly apparent at the MDC. It houses approximately 1,700 inmates, with most in small two-man cells with a shared toilet and sink, and eating meals and having whatever recreation remains in groups of 70 or more (*see also* Williams Aff., ¶7). During the present lockdown, inmates are released from their cells for one or two thirty-minute periods each Monday, Wednesday, and Friday, during which the 70 men share the

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[3] Joseph A. Bick (2007). Infection Control in Jails and Prisons. Clinical Infectious Diseases 45(8):1047-1055, at https://doi.org/10.1086/521910; Williams Aff., ¶6.

[4] "Achieving A Fair And Effective COVID-19 Response: An Open Letter to Vice-President Mike Pence, and Other Federal, State, and Local Leaders from Public Health and Legal Experts in the United States," (Mar. 2, 2020), at https://bit.ly/2W9V6oS.

same few computers and telephones, which are not sanitized between use. To date, the MDC has not met even the most basic recommendations of the CDC for preventing the spread of the coronavirus. Staff are often not wearing face masks or gloves and there is no hand sanitizer available.

The government misleading states that "[a]s of April 16, 2020, there have been five confirmed cases of COVID-19 among inmates incarcerated at MDC." (Gvt. L., at 6.) To give that number without the number of those tested is, in the gentle words of the law, a material omission. In fact, the institution has tested only 12 inmates. Without testing, it is impossible to identify infected inmates, effectively isolate them, and quarantine those with whom they had contact. The result is to fan the flames of the contagion. In comparison, on Rikers Island, which has undertaken much more testing, 362 inmates tested positive.[5] In the federal prison system nation-wide, even with its inadequately low levels of testing, positive cases have risen from 2 confirmed cases among inmates and staff on March 20 to 804 on April 18.[6] The lack of testing at the MDC should send shivers down anyone's spine. According to Dr. Sara Cody, the chief health officer of Santa Clara County, south of San Francisco, earlier action that would have helped in preventing deaths requires "widespread testing earlier" and the ability "to document the level of transmission . . . . "[7]

If the government wants to focus on the number 5, it might consider the following: On March 29, at the FCI Oakdale, the BOP reported that 5 inmates were positive for COVID-19. That same day Oakdale reported the death of Patrick Jones from the day before. Within a few more days, 4 more had died there. The total dead at Oakdale is now 7.[8] Similarly, on April 2, the BOP reported that there were 2 inmates at FCI Elkton who had tested positive for COVID-19. That same day, the first of 6 people at Elkton died.[9] So far, at least 21 federal inmates have died.[10]

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[5] *Coronavirus Infection Rates as of April 18, 2020*, The Legal Aid Society (Apr. 11, 2020), at https://www.legalaidnyc.org/Covid-19-infection-tracking-in-nyc-jails/.

[6] *COVID-19 Tested Positive Cases*, Federal Bureau of Prisons (Apr. 19, 2020), at https://www.bop.gov/coronavirus/index.jsp.

[7] "The timeline of the virus's spread in the U.S. shifts with the revelation of an early death in California," The New York Times (April 22, 2020), https://www.nytimes.com/2020/04/22/us/coronavirus-live-coverage.html?action=click&module=Spotlight&pgtype=Homepage.

[8] Janet Reitman, "'Something Is Going to Explode': When Coronavirus Strikes a Prison: An oral history of the first fatal outbreak in the federal prison system, in Oakdale, La.," *The New York Times* (April 18, 2020); https://www.nytimes.com/2020/04/18/magazine/oakdale-federal-prison-coronavirus.html.

[9] Kaylyn Hlavaty, "6th Inmate at Elkton Federal Correctional Institution Dies from COVID-19," *ABC 5 News Cleveland* (April 16, 2020), https://www.news5cleveland.com/news/continuing-coverage/coronavirus/6th-inmate-at-elkton-federal-correctional-institution-dies-from-covid-19.

[10] *Press Releases*, Federal Bureau of Prisons (Apr. 19, 2020), at https://www.bop.gov/resources/press_releases.jsp.

The government downplays Mr. Vasquez's risks because the Presentence Report describes him as in good health (*see* Gvt. L., at 5; *see also id*., at 2). Indeed, it does (*see* PSR, ¶43). In fact, however, the state of Mr. Vasquez's health is uncertain. Like many illegal reentrants, he is hard-working and poor (*see, e.g., id*., ¶53). There is no evidence that he has ever enjoyed the fruits of decent medical care. What we do know is that four of his five sisters have died prematurely – from strokes or other inherited defects (*see* PSR, ¶32). Whether the conditions that killed so many siblings were inherited and afflict Mr. Vasquez in some form or other is simply unknown.

We hope, of course, that Mr. Vasquez is healthy. But what difference does that make when assessing the risks of infection with a new, unknown, but frightening disease? It also attacks otherwise healthy individuals. Data from the Centers for Disease Control and Prevention ("CDC") show that nearly 40% of patients hospitalized from coronavirus were 20 to 54 years old.[11] In New York State, more than half of all cases are 18 to 49-year-olds.[12] In New York City, 46% of positive tests are for 18 to 44-year-olds (Williams Aff. ¶11). Young people with no preexisting conditions are dying.[13]

The government asks the Court to adjourn sentencing in part because in another case a judge delayed sentence where the defendant had sought "a significant downward variance" from 24-30 months down to 5 months, and the government analogizes to Mr. Vasquez, who seeks "a substantial downward variance" from 8-14 months to 5 months (*see* Gvt. L., at 2). In drawing this analogy, the government uses words, not logic. Mr. Vasquez is seeking a Guidelines sentence under Zone B and, to the extent the request is for a downward departure or variance, it is a modest one. Let's do the numbers. A reduction to the low end of the Guidelines in the government's example is to 5 months from 24 months, which is approximately 21%; a reduction in Mr. Vasquez's case is to 5 months from 8 months, which is approximately 63%. Considered in terms of absolute time, Mr. Vasquez is not asking for an approximate two year reduction from the low end, but three months.

The case law on the relationship between COVID-19 and issues of custody hardly shake out the way the government suggests. For example, in the bail context, judges in the Eastern District of released have released previously-detained defendants based in part on the risks posed to them by Covid-19 if detained. *See, e.g., U.S. v. Eli*, 20-CR-50 (RJD)(RER)(releasing, over government objection, a defendant charged with multiple robberies involving guns and drugs, because of Covid-19 risk); *U.S. v. Woolfolk*, 18-CR-115 (DLI)(RER)(releasing, over government objection, a

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[11] "Younger Adults Make Up Big Portion of Coronavirus Hospitalizations in U.S.," *The New York Times* (Mar. 20, 2020), at https://www.nytimes.com/2020/03/18/health/coronavirus-young-people.html; *see also* Williams Aff., ¶11.

[12] "Coronavirus Live Updates," *The New York Times* (Mar. 22, 2020), at https://www.nytimes.com/2020/03/22/world/coronavirus-updates-world-usa.html (updating regularly).

[13] *See* "Brooklyn High School Principal, 36, Dies From Coronavirus," *The New York Times* (Mar. 25. 2020), at https://www.nytimes.com/2020/03/25/nyregion/brooklyn-high-school-principal-36-dies-from-coronavirus.html?action=click&module=Well&pgtype=Homepage&section=New%20York; "Teenager's Death in California is Linked to Coronavirus," *The New York Times* (Mar. 24, 2020), at https://www.nytimes.com/2020/03/24/us/california-coronavirus-death-child.html.

defendant with epilepsy to a shelter); *U.S. v. George*, 19-CR-327 (ENV)(releasing, over government objection, a defendant exhibiting Covid-like symptoms who had jumped out a second floor window to avoid arrest); *U.S. v. Rivera*, 11-CR-2 (RJD)(RER)(releasing, over Probation's objection, a VOSR defendant without pre-existing conditions); *U.S. v. Plasencia*, 20-MJ-205 (SJB)(releasing, on consent, a defendant charged with illegal possession of a firearm after having been previously convicted of a felony attempted armed robbery, and whose initial application for bail was denied, because of the Covid pandemic); *U.S. v. DeAlba*, 19-CR-563 (DLI)(SJB)(releasing, on consent, a defendant charged in a heroin and methamphetamine case, due to a combination of medical conditions, none of which were on the CDC list); *U.S. v. McKenzie*, 20-CR-120 (WFK)(releasing, on consent, a defendant with asthma in a passport fraud case); *U.S. v. Sienkiewicz*, 19-MJ-859 (JO)(releasing, on consent, a defendant in am extradition matter); *U.S. v. Grubisich*, 19-CR-102 (RJD)(SMG)(removing an unmet prior requirement of a fifth suretor to release a defendant); *see also U.S. v. Capaldo*, 19-CR-442 (ILG)(MKB); *U.S. v. Khan*, 20-CR-127 (LDH); *U.S. v. Espinal*, 17-CR-231 (RRM)(RER); *U.S. v. Ocasio*, 17-CR-323 (LDH); *U.S. v. Mundo*, 17-CR-125 (LDH)(CLP).

Judges in the Southern District of New York have also recognized Covid-19 as an essential factor to consider when determining bail or detention. After having remanded a defendant less than two weeks earlier, Judge Alison Nathan reversed herself "in light of circumstances that have changed since the March 6 hearing," namely, "the unprecedented and extraordinarily dangerous nature of the Covid-19 pandemic." *U.S. v. Stephens*, 15-CR-95 (AJN) (S.D.N.Y.). Similarly, another judge denied the government's request for the revocation and detention of a defendant who had pleaded guilty to conspiracy to commit Hobbs Act robbery, attempted Hobbs Act robbery, and the use of a firearm in relation to a drug trafficking crime. *U.S. v. Lopez*, 19-CR-323 (JSR)(S.D.N.Y.). That judge found that "the coronavirus situation does create, on its own, an exceptional circumstance possibility," that "the number of [coronavirus cases] has been increasing by a substantial percentage each day," that the pandemic "creates a danger if [the defendant] is placed in a prison facility, regardless of where that facility is, while the virus is still increasing exponentially throughout the United States," and that "the Bureau of Prisons is not really equipped to deal with this in anything like the way one would ideally want." *Id*.

State courts and courts in other districts have also released inmates in hopes of curtailing the virus and protecting communities. In New Jersey, approximately 1,000 inmates were granted release in an effort to curb the spread of the Covid-19. *See In re Request to Commute or Suspend County Jail Sentences*, Docket No. 084230 (N.J. Mar. 22, 2020)(releasing a large class of defendants serving time in a county jail "in light of the Public Health Emergency" caused by Covid-19); *see also Xochihua-James v. Barr*, No. 18-71460 (9th Cir. Mar. 23, 2020)(a sua sponte decision releasing a detainee from immigration detention "in light of the rapidly escalating public health crisis"); *U.S. v. Garlock*, 18-CR-418 (VC)(N.D. Cal. Mar. 25, 2020)(citing "chaos" inside federal prisons in sua sponte extending time to self-surrender: "[b]y now it almost goes without saying that we should not be adding to the prison population during the Covid-19 pandemic if it can be avoided/").

Similarly, in the sentencing context, the Court should weigh the abject conditions to which Mr. Vasquez has been subjected, as well as the risk of infection, when determining the "total harm and benefits to prisoner and society" that additional imprisonment will yield. *See U.S. v. D.W.*, 198 F. Supp. 3d 18, 23 (E.D.N.Y. 2016); *see also Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015)(Kennedy, J., concurring)(calling for heightened judicial scrutiny of the projected impact of jail and prison conditions on a defendant); *U.S. v. Mateo*, 299 F. Supp. 2d 201, 212 (S.D.N.Y. 2004)(reducing a

sentence where a defendant's pretrial conditions were "qualitatively more severe in kind and degree than the prospect of such experiences reasonably foreseeable in the ordinary case"); *U.S. v. Francis*, 129 F. Supp. 2d 612, 619-20 (S.D.N.Y. 2001)(reducing sentence in acknowledgment of "the qualitatively different, substandard conditions to which the defendant was subjected" in pretrial detention). As Judge Furman commented in imposing a below-guidelines sentence due in part to the winter power outage at MDC Brooklyn in February 2019: "it's pretty clear to me . . . that steps could have been taken, and taken more quickly, to address the problems [at the MDC]. And the bottom line is, the conditions that I read about are the conditions that one associates with a third world country and not a country like this, and nobody in detention . . . should have to endure that as the detainees did at the MDC." *U.S. v. Ozols*, 16-CR692 (JMF)(S.D.N.Y.); *see also U.S. v. Bruney*, 18-CR-542 (PKC), ECF Nos. 22, 24 (granting downward variance due to blackout conditions at MDC); *U.S. v. Acosta De La Rosa*, 18-CR-667 (PKC)(same).

In short, the especially harsh lockdown conditions at the MDC, combined with the fact that one less person at there creates a safer environment for everyone throughout the city, weigh strongly in favor of conducting remote sentencing expeditiously.

* * *

Since my original motion on April 16, I have had a chance to consult directly by phone with Mr. Vasquez-Reyes with the assistance of a Spanish interpreter. He has told me that he consents to – and, in fact, affirmatively wants – a remote sentencing.

As I indicated in my original motion, I will make a substantive sentencing submission next week.

Conclusion

For these reasons, and all the reasons stated in my submission of April 16, 2020, I move that the Court reconsider and order a remote sentencing between May 1 and 5, 2020.

Sincerely,

/s/

Douglas G. Morris
Assistant Federal Defender
(718) 330-1209

cc: Assistant U.S. Attorney Devon Lash

U.S. Probation Officer Lisa A. Langone

Clerk of the Court

Mr. Oscar Vasquez-Reyes, Inmate #92074-053