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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MICHAEL ROMANO, *Petitioner,* v. WARDEN, FCI FAIRTON, *Respondent.*	Hon. Christine P. O'Hearn, U.S.D.J. Civil Action No. 23-2919 (CPO) **Motion Day Subject to Court Order, ECF No. 53**

RESPONDENT'S BRIEF IN SUPPORT OF A MOTION TO DISMISS UNDER RULE 12(b)(1) AND CROSS-MOTION FOR SUMMARY JUDGMENT UNDER RULE 56(a)

On the Brief:
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

PRELIMINARY STATEMENT

Petitioner Michael Romano is a federal inmate serving a 240-month term of incarceration for defrauding over one thousand elderly people out of a total of $33 million dollars in connection with the sale of Benjamin Franklin half-dollars and other coins. On October 23, 2023, Petitioner filed an amended petition for a writ of habeas corpus under 28 U.S.C. § 2241, arguing that the Federal Bureau of Prisons ("BOP") violated his procedural and substantive due process rights by revoking his home confinement after 27 days and transferring him back to Federal Correctional Institution ("FCI") Fairton. BOP placed Petitioner in home confinement under the Coronavirus, Aid, Relief, and Economic Security ("CARES") Act of 2020, a now-expired program to reduce the inmate population during the COVID-19 pandemic. BOP revoked Petitioner's CARES Act home confinement after a reevaluation from BOP's Home Confinement Committee precipitated by "extreme concerns" from federal prosecutors that Petitioner might reoffend and that home confinement was not an appropriate placement. The Court should dismiss the petition or grant summary judgment in favor of Respondent for several reasons.

First, Petitioner's characterization of prosecutors' involvement with BOP as "overzealous" is a red herring. Despite the novelty of Petitioner's circumstances, BOP's decision to grant—and revoke—his home confinement was a placement decision, and it is well established that courts in the Third Circuit lack habeas jurisdiction over such decisions. This is because placement decisions do not affect the fact or duration of an inmate's incarceration, which is the core purpose of habeas.

Furthermore, the fact that BOP received (and considered) input from federal prosecutors as part of its home confinement decision is appropriate and does not alter these bedrock jurisdictional limitations.

Second, Petitioner does not have a liberty interest in remaining on home confinement for 27 days, triggering due process protections. Recognizing a liberty interest would contradict binding Third Circuit case law and disregard the exclusive statutory discretion afforded to BOP by Congress for home confinement decisions. 18 U.S.C. § 3621(b) states in unambiguous terms that "a designation of a place of imprisonment," including home confinement, "is not reviewable by any court." Furthermore, Petitioner's reliance on "scant" district court decisions from the Second Circuit is misplaced, as that circuit has a broader view than the Third Circuit of habeas jurisdiction and those decisions analogize home confinement to parole, which was abolished 30 years ago. Also, Petitioner's liberty-interest claim to home confinement is an end-run around the compassionate release statute.

Third, the petition is moot. BOP's home confinement authority under the CARES Act expired in May 2023, when the COVID-19 public emergency ended. As a result, BOP no longer has the authority to transfer Petitioner to home confinement from FCI Fairton, even if Petitioner prevailed on his petition, and he is not yet eligible for home confinement under the current statute, 18 U.S.C. § 3624(c)(2).

Fourth, even if the Court were to hold that it had jurisdiction over BOP's placement decision, BOP did not abuse its discretion. BOP's decision to revoke Petitioner's home confinement after 27 days was decided by high-level officials sitting

on a Home Confinement Committee based on a fact-specific analysis. Any communications between allegedly "overzealous" prosecutors and BOP does not undermine that conclusion. On the contrary, the e-mails produced by Respondent in discovery reflect good faith differences of opinion between prosecutors and BOP regarding public safety. This was no rubber stamp.

Nor was Petitioner singled out. The prosecutors' concerns were not limited to Petitioner. And Petitioner is not the only person to ever have his home confinement revoked by BOP for reasons other than disciplinary infractions. There are plenty of other examples, highlighted in both case law and the spreadsheet submitted in connection with this motion. *See, e.g.*, *Triplett v. FCI Herlong, Warden*, No. 22-0083, 2023 WL 2760829, at *1 (E.D. Cal. Apr. 3, 2023), *R & R adopted*, 2023 WL 3467145 (E.D. Cal. May 15, 2023); *Wilford v. Engleman*, No. 2:24-cv-01470, 2024 WL 3973063, at *1 (C.D. Cal. Jun. 27, 2024) (R & R).

Fifth, Petitioner's requested relief—a return to CARES Act home confinement—is too broad. Rather, as the Court has already recognized in this case, "it appears the only relief available would be to order the BOP to reassess Petitioner's eligibility for home confinement." Thus, the Court should dismiss the petition for lack of jurisdiction under Rule 12(b)(1) or grant summary judgment in favor of Respondent under Rule 56(a).

STATEMENT OF FACTS

A. Petitioner's Decades-Long Fraud

Petitioner was the leader of a nationwide telemarking scam lasting almost 20 years. Between approximately January 1990 and November 2008, Petitioner and his co-conspirators misrepresented the grade and value of Benjamin Franklin half-dollars and other coins sold to customers, resulting in those customers purchasing coins worth approximately 10 to 20 percent of the purchase price. *See United States v. Romano*, No. 09-cr-168, ECF No. 168 (E.D.N.Y. June 13, 2011) (indictment). As a result of this scheme, Petitioner and his co-conspirators deposited over $33 million dollars in various companies owned by Petitioner. *See id.*

On June 13, 2011, a jury convicted Petitioner of conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. §§ 1341, 1343, and 1349, and conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(a)(1)(A)(i), (b), (h). *See id.*, ECF No. 295 (jury verdict). The sentencing court sentenced Petitioner to a 240-month term of incarceration and a five-year term of supervised release, which was later amended to a three-year term. *See id.*, ECF No. 403 (judgment), ECF No. 578. The court also ordered Petitioner to pay $9,139,727.10 million in restitution. *See id.*

Petitioner is currently serving his sentence at FCI Fairton. *See* Declaration of Jason Raguckas ("Raguckas Decl.") ¶ 5, ECF No. 20-2.[1] BOP projects that it will release Petitioner from custody on May 10, 2030, assuming he receives all good

[1] *BOP Inmate Locator*, https://www.bop.gov/inmateloc/ (last visited Dec. 1, 2024).

conduct time and earned time credits available to him under the First Step Act. *See id*.

B. Home Confinement Under the CARES Act

Petitioner is seeking a return to home confinement under the CARES Act. *See* Pub. L. 116-136, 134 Stat. 281 (Mar. 27, 2020). The CARES Act was emergency response legislation passed by Congress in March 2020 to address many areas of public health and economic activity during the COVID-19 pandemic, including the management of federal prisons. The CARES Act expanded BOP's authority to place inmates in home confinement to reduce the prison population and assist BOP in combatting the spread of COVID-19 outside of the limits set forth in 18 U.S.C. § 3624(c)(2). Under this statute, BOP is ordinarily limited to placing inmates in home confinement "for the shorter of 10 percent of the term of imprisonment of that prisoner or 6 months."

However, "[n]othing" in the CARES Act limited or restricted "the authority of the Director of the Bureau of Prisons under section 3621" regarding placement decisions. *See* 18 U.S.C. § 3624(c)(4). Section 3621 grants BOP wide discretion over inmate placement decisions, which are "not reviewable by any court." 18 U.S.C. § 3621(b). And the CARES Act adopted similar discretionary language in its home confinement provision. *See* CARES Act § 12003(b)(2) ("[T]he Director of the Bureau *may* lengthen the maximum amount of time for which the Director is authorized to place a prisoner in home confinement under the first sentence of section 3624(c)(2) of

title 18, United States Code, *as the Director determines appropriate*." (emphasis added)).

While the CARES Act sought to reduce the prison population, the statute did not alter BOP's obligation to protect public safety.[2] As the Attorney General explained at the time, the "last thing" the public needs right now is the "indiscriminate release" of inmates without "careful, individualized determinations." *Id.* To ensure "careful, individualized determinations" for CARES Act home confinement, the Attorney General emphasized to BOP that it should base its determinations on the totality of the circumstances for each individual inmate, the statutory requirements for home confinement, and a non-exhaustive list of discretionary factors, including the inmate's crime of conviction and an assessment of the danger posed by the inmate to the community. Raguckas Decl. ¶¶ 3-5, ECF No. 20-1 at 2-4.

In addition, to deploy its resources in the most effective manner, BOP "prioritized" home confinement for inmates based on the following additional discretionary factors: (1) have served 50 percent or more of their sentences; (2) have 18 months or less remaining on their sentences; or (3) have 18 months or less remaining in their sentences and have served 25 percent or more of their sentences, in order to be eligible for home confinement. *See id.*, Ex. 1, ECF No. 20-1 at 13.

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[2] https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement_april3.pdf (last visited Dec. 1, 2024).

Prior to transferring an inmate to home confinement, BOP notifies an inmate's victims under Program Statement 1490.06. *See id.* ¶ 15, ECF No. 20-1 at 8; *see also id.*, Ex. 5, ECF No. 20-1 at 29-56. Furthermore, as of December 31, 2022, in cases where an inmate had five years or more remaining on his sentence, BOP was required to contact the prosecuting United States Attorney's Office to solicit input on the appropriateness of home confinement, *id.* ¶ 11 and Ex. 2, ECF No. 20-1 at 7, although this procedure was not formally in place at the time of Petitioner's June 2022 transfer to home confinement.

BOP's expanded home confinement authority under the CARES Act was not an indefinite. Section 12003(b)(2) authorized BOP to place inmates in home confinement during the national emergency concerning the COVID-19 pandemic. The emergency declaration expired in May 2023.[3] Therefore, BOP's home confinement decisions are no longer governed by the CARES Act. Instead, home confinement eligibility is now governed by 18 U.S.C. § 3624(c)(2), which permits "home confinement for the shorter of 10 percent of the term of imprisonment of that prisoner or 6 months." The only exception to this is that "any prisoner placed in home confinement under the CARES Act who is not yet otherwise eligible for home confinement under separate statutory authority" may "remain in home confinement under the CARES Act for the remainder of the prisoner's sentence, as the Director [of

[3] https://archive.cdc.gov/www_cdc_gov/coronavirus/2019-ncov/your-health/end-of-phe.html (last visited Dec. 6, 2024).

BOP] deems appropriate, provided the prisoner is compliant with all conditions of supervision." 28 C.F.R. § 0.96(u)(2).

C. Prosecutor's "Extreme Concerns" About Petitioner

Prior to Petitioner's referral for CARES Act home confinement, federal prosecutors from the United States Attorney's Office for the Eastern District of New York ("EDNY"), began expressing objections and concerns to BOP about the possibility of Petitioner's transfer to home confinement. *See* ECF No. 43 at 42 ("I'll forward your concerns/opposition to the institution so it c[an] be considered."). Among other things, BOP staff noted that EDNY "was advised of [Petitioner's] proposed release via home confinement and she stated that she has major concerns regarding his release. Specifically, she stated that he could run his business from home." Raguckas Decl., Ex. 3 ¶ 12, ECF No. 20-1 at 24.

Nevertheless, the concerns of EDNY prosecutors in March 2022 did not outweigh the other factors BOP considered in deciding to transfer Petitioner to home confinement. *See id.* According to an e-mail from BOP Regional Counsel shortly after the referral, BOP was reluctant to give EDNY's concerns "greater weight" than the other criteria established at the time to determine home confinement placement under the CARES Act. *See* ECF No. 43 at 41.

BOP therefore notified Petitioner's victims via an e-mail alert system that it was transferring Petitioner to home confinement, Raguckas Decl. ¶¶ 15-16, ECF No. 20-1 at 8, and BOP referred Petitioner to CARES Act home confinement, to commence in June 2022, *id.*, ECF No. 20-1 at 24. BOP's referral paperwork stated that the basis

for his Petitioner was in part the fact that he has "served over 50% of his sentence." *Id.* This 50 percent assessment, however, was "unfortunately inaccurate" at the time of the referral. *Id.* ¶ 13, ECF No. 20-1 at 7-8. Petitioner had only served 48.8 percent of his sentence. ECF No. 7-1 at 31.

Despite BOP's referral of Petitioner to home confinement, EDNY prosecutors continued to communicate their public safety concerns. Nor did Petitioner's referral to home confinement end BOP's deliberations over whether he was appropriate for that placement. For example, in April 2022, after Petitioner's referral but before his transfer, EDNY prosecutors requested further information from BOP concerning Petitioner's placement status and the opportunity to express their objections. According to e-mails produced in discovery by Respondent and filed on the docket by Petitioner, EDNY inquired as follows:

> Mr. Howard, the investigator assigned to this matter has been receiving calls from Mr. Romano's victims. Will you please give us an update? Thank you."
>
> Hi, may we please have an update on our objection to Michael Romano's release. Thank you.

See ECF No. 43 at 42. BOP forwarded these concerns from EDNY prosecutors to "Mr. Romano's community placement to FCI Fairton." ECF No. 43 at 41.

EDNY prosecutors continued to disagree with BOP as to the weight given to their public safety concerns in assessing whether Petitioner was appropriate for home confinement. *See id.* at 49. Accordingly, in or around late-April, EDNY prosecutors contacted the Office of the Deputy Attorney General, a high-level component within the Department of Justice, to reiterate their concerns about Petitioner and "several"

other defendants; specifically, prosecutors described Petitioner's ability to "resume" his "massive elder fraud" in home confinement:

> I am not sure if this is within your purview in your new role, but we have recently had several defendants release to home confinement under the guise of [t]he AG's directives to wardens, and many of them have been very disconcerting. The most recent is the one described below [involving Petitioner], but in short the defendant was sentenced to 240 months and is being released 9 years early. The defendant committed a massive elder fraud, which he could easily resume doing from home confinement. I just wonder if there has been any thought to revising these directives as we now have wardens basically replacing their judgment for that of the Article III judge that imposed sentence.

ECF No. 43 at 49.

Petitioner has characterized these communications as coming from "an overzealous group of AUSAs, who had repeatedly contacted a former colleague to encourage the BOP to terminate Mr. Romano's home confinement." ECF No. 42 at 8. Nonetheless, while EDNY continued its dialogue with BOP and Department of Justice components, BOP transferred Petitioner to home confinement on June 22, 2022. *See* ECF No. 20-1 at 27 (administrative release).

D. The Home Confinement Committee's Further Deliberation

In early July 2022, during Petitioner's 27 days of home confinement, the Home Confinement Committee at BOP's Central Office "was tasked to review the Petitioner for CARES Act placement." Declaration of Rick Stover ("Stover Decl.") ¶ 3, ECF No. 20-2 at 2. The Home Confinement Committee was responsible for reviewing "specific inmates for CARES Act home confinement when factors outside the BOP's

enumerated list may affect the appropriateness of their placement." *Id.* ¶ 2. Mr. Stover was chair of the committee. *Id.*

At the time of this review, it was Mr. Stover's understanding "that victims and the prosecuting United States Attorney's Office were voicing extreme concern with [Petitioner's] placement." *Id.* Mr. Stover reviewed the concerns memorialized in Petitioner's March 2022 referral documents. *See* ECF No. 43 at 46. Mr. Stover was also privy to e-mails exchanged between EDNY prosecutors and the Office of the Deputy Attorney General in July 2022 regarding whether Petitioner should remain in home confinement. *See id.* at 47-49 (e-mail chain).

On July 18, 2022, the Home Confinement Committee determined, based on the totality of the circumstances, that Petitioner was inappropriate for home confinement placement. *See* Stover Decl. ¶ 4, ECF No. 20-2 at 2. The most "important[]" factor to the committee was the nature of Petitioner's crimes and the nine years he had remaining on his sentence. *See id.* The committee also noted that Petitioner had less than 50 percent remaining on his sentence at the time of his transfer to home confinement. *See id.*

The Home Confinement Committee's rationale is consistent with assertions made by Petitioner. As Petitioner emphasizes in his filings, the 50 percent threshold was not the only factor for home confinement placement. *See* ECF No. 42 at 8 ("[T]here is no requirement that an inmate serve 50 percent of a sentence before release to CARES Act home confinement."). It also true that some BOP employees had different understandings regarding how strictly to interpret the 50-percent

threshold and the degree to which this threshold impacted BOP's decision to revoke Petitioner's home confinement, especially of those employees were not directly involved in decision-making. One example of a misunderstanding involved Jason Raguckas. As Mr. Raguckas noted in his December 2023 declaration, it was his "understanding that the Home Confinement Committee returned Petitioner to the institution because he had not yet served 50% of the sentence imposed, which was one of the established criteria by the BOP." *See* Raguckas Decl. ¶ 19, ECF No. 20-1 at 9.[4] Likewise, based on Mr. Raguckas's understanding, Respondent in the July 2023 answer to the petition incorrectly described the 50-percent threshold as a "clerical error" serving as the basis for Petitioner's revocation. *See* ECF No. 7 at 12 n.3; *see also id.* at 2 ("BOP's decision to exercise its discretionary placement authority and return Petitioner to FCI Fairton due to a clerical error is not an abuse of its discretion."). Nevertheless, with the benefit of post-answer discovery, it is apparent that EDNY prosecutors' input to BOP and Department of Justice components was a significant factor in the Home Confinement Committee's revocation of Petitioner's home confinement.

BOP transferred Petitioner from home confinement back to FCI Fairton on July 19, 2022. Stover Decl. ¶ 5, ECF No. 20-2 at 3. At the time of this revocation, Petitioner had been in home confinement for 27 days. *See* Raguckas Decl. ¶ 19, ECF No. 20-1 at 9.

[4] Paragraphs 19 and 20 of the Raguckas Declaration are incorrectly labeled as paragraphs 8 and 9.

Petitioner is not the only inmate to ever have his home confinement revoked by BOP for reasons other than disciplinary infractions. *See Triplett*, 2023 WL 2760829, at *1; *Wilford*, 2024 WL 3973063, at *1 (home confinement revoked without any alleged notice of "any incident report or rule violation write-up"). According to BOP, the spreadsheet produced by Respondent in discovery and filed in part by Petitioner also identifies examples in which BOP revoked an inmate's home confinement for reasons other than disciplinary infractions.

RRC FAILURE LOG

		SECTOR:	Western		
		Month:	August		Year:

RRC or HC	CV-COM REF YES/NO	PROHIBITIED ACT/CODE	PROHIBITED ACT	COMMENTS RE: OFFENSE/FAILURE	3621E Y/N	DHO SANCTIONED Y/N
RRC	Y	N/A	N/A	AUSA noted safety concerns, made threats to staff members and residents community. ALI SCP advised	N	N
HC	Yes	N/A	None	DHC placement issues, will return to DHC in 14 days	N	N/A
HC	Y	NA	NA	PROGRAM REMOVAL - NO APPROVED HOME & RELOCATION DENIED	N	N
HC	Yes	N/A	None	Warrant received from Gregg County requesting detainer on 08/03/2020 - Will release from 6DV on 08/23/2020 (GCT) - Failure Report approved by SMT on 08/04/2020	N	N/A
HC	Y	NA	NA	Release plan is no longer viable.	N	N
HC	yes	N/A	N/A	HC Address no longer viable - Waiting on Redesignation by DSCC - Can not return to parent institution because of COVID-19 numbers per DSCC	N	N/A
HC	Yes	N/A	None	HC Address no longer viable - Failure Report approved by SMT on 09/09/2020 - DST ERE SCP	N	N/A
HC	Yes	N/A	None	HC Address no longer viable - Failure Report approved by SMT on 09/09/2020 - DST CRW LOW	N	N/A

See ECF No. 43 at 39; Declaration of John F. Basiak Jr. ("Basiak Decl., Ex. 1.).

When Petitioner eventually served 50 percent of his sentence, BOP reconsidered Petitioner for CARES Act home confinement placement, but the Home Confinement Committee denied that placement. *See* Raguckas Decl. ¶ 19, ECF No. 20-1 at 9.

E. Procedural History

In February 2023, Petitioner filed a habeas petition under § 2241, arguing that BOP violated his due process rights in revoking his home confinement and subsequently denying his follow-on request. *See* Pet., *Romano v. Warden, FCI*

Fairton, No. 23-1052-CPO, ECF No. 2-1 (D.N.J. Feb. 24, 2023). This Court ordered the respondent to file a limited answer addressing two issues: (1) whether the Court has jurisdiction under 28 U.S.C. § 2241 to consider Petitioner's claims; and (2) whether Petitioner has a cognizable liberty interest in home confinement. *See id.*, ECF No. 6. Respondent answered the petition, arguing for dismissal for lack of subject matter jurisdiction and because Petitioner did not have a due process liberty interest in home confinement. *See id.*, ECF No. 8. The Court dismissed Petitioner's claims seeking an order for home confinement "with prejudice" for lack of subject matter jurisdiction and his abuse-of-discretion claim without prejudice for failure to exhaust his administrative remedies. *See id.*, ECF Nos. 12-13.

On May 26, 2023, Petitioner filed a new petition before the Court, again arguing that BOP violated his due process rights when it revoked his home confinement placement under the CARES Act without a hearing. *See* ECF No. 1. Respondent answered that petition on July 31, 2023, again arguing for dismissal of the petition for lack of subject matter jurisdiction and because Mr. Romano did not have a cognizable liberty interest in home confinement. *See* ECF No. 7.

On October 23, 2023, Petitioner filed the amended petition again asserting that BOP violated his procedural and substantive due process rights by revoking his home confinement. ECF No. 14 at 9-10. Petitioner has also filed two motions for bail pending habeas and for limited discovery, which Respondent opposed. ECF Nos. 14, 16, 42, 47. The Court denied Petitioner's first bail motion without prejudice. ECF

No. 26. The parties have completed discovery, and the parties are now filing cross-motions for summary judgment under the Court's briefing schedule. ECF No. 51.

STANDARD OF REVIEW

The Habeas Rules. Courts in this District apply the Rules Governing 2254 Cases (the "Habeas Rules") to petitions brought under 28 U.S.C. § 2241. *See* Habeas R. 1(b) ("The district court may apply any or all of these rules to a habeas corpus petition not covered by Rule 1(a)."); *see also Capistrano v. Knight*, No. 23-2813 (CPO), 2024 U.S. Dist. LEXIS 32058, at *2 (D.N.J. Feb. 23, 2024) (discussing Habeas R. 1(b)). Under Rule 12 of the Habeas Rules, the Court can also apply "[t]he Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions" of the Habeas Rules.

Rule 12(b)(1). Respondent argues that the Court lacks jurisdiction over the petition. A motion to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1) "attacks the right of a plaintiff to be heard in Federal Court." *Doughty v. United States Postal Serv.*, 359 F. Supp. 2d 361, 364 (D.N.J. 2005). The court may dismiss for lack of subject-matter jurisdiction at any time regardless of whether an answer to the complaint has been filed or the parties have conducted discovery. *CNA v. United States*, 535 F.3d 132, 145-46 (3d Cir. 2008). "Challenges to subject matter jurisdiction under Rule 12(b)(1) may be facial or factual." *Common Cause of Pa. v. Pennsylvania*, 558 F.3d 249, 257 (3d Cir. 2009) (cleaned up). In factual challenges, the Court is not bound by the allegations in the complaint and "may consider evidence outside the pleadings." *United States ex rel. Customs Fraud Investigations, LLC v.*

Victaulic Co., 839 F.3d 242, 251 (3d Cir. 2016). Furthermore, "[t]he presumption of truth does not extend to" a factual attack on jurisdiction "'and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.'" *Courts v. United States*, No. 15-7303 (MLC), 2016 U.S. Dist. LEXIS 115268, at *7 (D.N.J. Aug. 29, 2016) (quoting *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977)). The Court may dismiss a complaint based on a factual challenge "at any time." *See* Fed. R. Civ. P. 12(h)(3).

Rule 56(a). To the extent the Court does not dismiss the petition for lack of jurisdiction, Respondent seeks summary judgment under Rule 56(a). Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." A genuine dispute exists "only if there is a sufficient evidentiary basis on which a reasonably jury could find for the non-moving party, and a factual dispute is material only if it might affect the outcome of the suit under governing law." *Kaucher v. Cnty. of Bucks*, 455 F.3d 418, 423 (3d Cir. 2006).

In opposing summary judgment, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The non-moving party must "cite to particular parts of materials in the record" to "show that the materials cited do not establish the absence of a genuine dispute." Fed. R. Civ. P. 56(c)(1)(A), (B) (cleaned up). "The mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient; there

must be evidence on which the jury could reasonably find for the [non-moving party]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

LEGAL ARGUMENT

I. The Court Lacks Jurisdiction Over BOP Placement Decisions

Although this petition presents somewhat unique facts stemming from a CARES Act provision no longer in effect, the underlying jurisdictional issues are well-settled. *See Cardona v. Bledsoe*, 681 F.3d 533, 536 (3d Cir. 2012) (establishing boundaries of habeas jurisdiction). As this Court stated in the *Tetterton v. Warden*, courts do not have jurisdiction under § 2241 over home confinement claims because they are placement decisions that do not affect the fact or duration of an inmate's sentence:

> BOP's home confinement decisions affect only *where* and under what circumstances Petitioner will serve his sentence, rather than the 'fact or duration' of his sentence. Nor do they affect the 'execution' of his sentence, as the BOP's decisions on home confinement do not impact or conflict with his sentencing court's judgment or recommendations.

See No. 23-1394-CPO, 2023 WL 4045086, at *2-4 (D.N.J. June 16, 2023) (citing *Cardona*, 681 F.3d at 536); *see also Romano v. Warden, FCI Fairton*, No. 23-1052-CPO, 2023 WL 3303450, at *4 (D.N.J. May 8, 2023) (same). In other words, the restoration of Petitioner's home confinement would not result in a speedier release for Petitioner, which is the core purpose of habeas, and Petitioner's projected release date will remain the same, May 10, 2030, regardless of the outcome of this petition. Thus, the Court lacks jurisdiction over the petition.

The Third Circuit limitations on habeas jurisdiction, as established in *Cardona* and discussed in *Tetterton*, are consistent with the relevant statutes. Under 18 U.S.C. § 3621(b), it is solely the responsibility of BOP to "'designate the place of the prisoner's imprisonment' based on an individualized and fact-intensive analysis of the inmate." *Davey v. Warden Lamine N'Diaye*, No. 22-2254-RMB, 2023 WL 2570221, at *7 (D.N.J. Mar. 20, 2023) (quoting 18 U.S.C. § 3621(b)). "'Any order, recommendation, or request by a sentencing court that a convicted person serve a term of imprisonment in a community corrections facility shall have no binding effect on the authority of [BOP] under this section to determine or change the place of imprisonment of that person.'" *Id.* (quoting 18 U.S.C. § 3621(b)(5)). Furthermore, "'a designation of a place of imprisonment under this subsection is not reviewable by any court.'" *Id.* (quoting 18 U.S.C. § 3621(b)(5)).

The CARES Act did not alter these jurisdictional boundaries and statutory limitations. Indeed, "[n]othing" in that CARES Act limited or restricted "the authority of the Director of the Bureau of Prisons under section 3621" regarding placement decisions. *See* 18 U.S.C. § 3624(c)(4). Quite the contrary. Section 12003(b)(2) of the CARES Act reaffirmed that BOP "*may* lengthen the maximum amount of time for which the Director is authorized to place a prisoner in home confinement . . . *as the Director determines appropriate*." (emphasis added).

As Chief Judge Bumb recently stated, "Congress's decision to grant the Attorney General and BOP this substantial authority and discretion concerning home confinement under the CARES Act reflects a long-standing practice of deferring to

BOP regarding the transfer and placement of inmates." *Davey*, 2023 WL 2570221, at *7. Stated another way, when it comes to decisions concerning an inmate's eligibility for home confinement, "BOP has the first and last word." *United States v. Dunich-Kolb*, No. 14-150-KM, 2020 WL 6537386, at *12 (D.N.J. Nov. 5, 2020). Consequently, "many courts" have held that BOP's denial of CARES Act home confinement is "'not reviewable by any court.'" *Perri v. Warden of FCI Fort Dix*, No. 20-13711-RBK, 2023 WL 314312, at *3-4 (D.N.J. Jan. 19, 2023) (quoting *Reynolds v. Finley*, No. 21-1251, 2022 WL 36225, at *5 (M.D. Pa. Jan. 4, 2022)). Those holdings apply equally here.[5]

This Court's decision in *Tetterton* is consistent with these principles, and its reasoning applies equally to this petition. In *Tetterton*, the petitioner was placed in home confinement under the CARES Act. *See id.* at *1. After seven months, BOP revoked that placement after he tested positive for opioids on two occasions. *See id.* The petitioner argued that BOP's revocation of his home confinement placement without a hearing violated the Due Process Clause of the Fifth Amendment. *See id.* at *2. Although this Court dismissed the petition without prejudice on other grounds, its jurisdictional discussion of *Cardona* is equally applicable to this petition:

> In contrast [to the Third Circuit's holding in *Cardona v. Bledsoe*, 681 F.3d 533, 536 (3d Cir. 2012)], in the present case, the BOP's home confinement decisions affect only

[5] Some courts have held that although a district court "cannot review . . . [a] challenge to the BOP's decision under the CARES Act, the Court may assess whether BOP abused its discretion." *See Collins v. Bradley*, No. 20-2230, 2021 WL 4318027, at *4 (M.D. Pa. Sept. 23, 2021) (internal quotations omitted), *aff'd sub nom. Collins v. Warden Canaan FPC*, No. 21-2878, 2022 WL 2752536 (3d Cir. July 14, 2022). But this Court has already effectively rejected that line of cases. *See Tetterton*, 2023 WL 4045086, at *3-4 ("Petitioner suggests that the Court should accept the latter line of cases . . . . This Court disagrees."); *Romano*, 2023 WL 3303450, at *4 (same).

> *where* and under what circumstances Petitioner will serve his sentence, rather than the 'fact or duration' of his sentence. Nor do they affect the 'execution' of his sentence, as the BOP's decisions on home confinement do not impact or conflict with his sentencing court's judgment or recommendations. Stated differently, the BOP's CARES Act home confinement decisions cannot conflict with Petitioner's sentencing judgment because he was sentenced prior to the COVID-19 pandemic and the enactment of the CARES Act.
>
> In light of the above, this Court is inclined to conclude that Petitioner has failed to meet his burden to demonstrate that this Court has jurisdiction under § 2241 to review home confinement decisions under the CARES Act.

See id. at *4 (citations omitted); *see also Romano*, 2023 WL 3303450, at *4 (same). The Court should apply this reasoning here, which involves far less time in home confinement than in *Tetterton*—seven months compared to Petitioner's 27 days.

The fact that Petitioner seeks restoration of his CARES Act home confinement—what he describes as the "status quo ante," ECF No. 42 at 4, 16, 22—should not alter the Court's analysis or expand the boundaries of habeas jurisdiction. If anything, Petitioner's characterization of his petition as seeking restoration of the status quo is further demonstration that the Court lacks jurisdiction. Restoring an inmate's conditions of confinement through an injunction is generally a civil rights (not habeas) remedy. *See Nelson v. Campbell*, 541 U.S. 637, 643 (2004) ("[C]onstitutional claims that merely challenge the conditions of a prisoner's confinement, whether the inmate seeks monetary or injunctive relief, fall outside of that core."); *see also Touizer v. Att'y Gen. of U.S.*, No. 20-5169, 2021 WL 371593, at *5 (S.D. Fla. Feb. 3, 2021) (dismissing challenge to CARE Act revocation because a

challenge to the 'circumstances of his confinement' rather than the execution of his sentence, the claim should be brought in a civil rights action rather than a habeas petition."), *aff'd*, 2021 WL 3829618 (11th Cir. Aug. 27, 2021).

Finally, the *Stein* case cited by Petitioner further undermines his jurisdictional argument. *See* ECF No. 42 at 22 (citing *United States v. Stein*, 541 F.3d 130, 146 (2d Cir. 2008)). That case involves pretrial constitutional violations by prosecutors in another district in which the court encouraged the filing of a civil suit for damages, not a habeas petition. *Stein*, 541 F.3d at 141-42. Thus, Petitioner's proposed "status quo" injunction is further evidence that the Court lacks subject-matter jurisdiction over Petitioner § 2241 habeas petition challenging the conditions of his confinement.

II. Petitioner Does Not Have a Liberty Interest in 27 Days of CARES Act Home Confinement

Petitioner seeks to avoid the bedrock limitations of habeas jurisdiction by claiming a procedural and substantive due process "liberty interest" in his 27 days of home confinement. That argument is misplaced. Consistent with binding precedent, district courts in this Circuit have rejected liberty-interest claims to CARES Act home confinement. *See Shah v. Warden, FCI Fort Dix*, No. 22-6306-RMB, 2023 WL 1794891, at *2 (D.N.J. Feb. 7, 2023); *see also Coburn, v. Spaulding*, No. 20-01389, 2021 WL 3026851, at *6 (M.D. Pa. June 15, 2021) ("an inmate does not possess a "protectable liberty interest" under the CARES Act regarding release on home confinement."), *R. & R. adopted*, 2021 WL 2678706 (M.D. Pa. June 30, 2021).

Petitioner's Parole Analogy Fails. Petitioner's liberty-interest claim is premised on an analogy to the federal parole system. *See* ECF No. 14-1 at 12 (citing

Morrissey v. Brewer, 408 U.S. 471 (1972)). But that analogy falls flat. Congress abolished parole in the federal system more than 30 years ago and replaced it with supervised release under 18 U.S.C. § 3624(e), not home confinement under § 3624(c)(2). *See United States v. Williams*, 2023 U.S. Dist. LEXIS 172493, at *14 (E.D. Pa. Sept. 26, 2023) ("In 1984, parole was abolished in the federal system and was replaced by supervised release."). Like parole, "supervised release commences on the day the person is released from imprisonment." 18 U.S.C. § 3624(e); *see United States v. Johnson*, 529 U.S. 53, 57 (2000). Home confinement, by contrast, is a "prerelease" placement in which the inmate is still serving a custodial sentence and is under the supervision and control of BOP. Thus, Petitioner's parole analogy lacks historical context and is unpersuasive.

Second Circuit Law is Different. Petitioner's parole analogy comes from select district courts in the Second Circuit[6] resting on the mistaken premise that home confinement has the "same features" as parole, and BOP has implicitly "promised" inmates that they can remain on home confinement unless they commit a disciplinary infraction. *See* ECF No. 42 at 12, 15 (citing cases); *see also Mason v. Alatary*, Civ. No. 23-193, 2024 U.S. Dist. LEXIS 153989, at *22-23 (N.D.N.Y Aug. 27, 2024) (discussing implicit promises).

[6] *Tompkins v. Pullen*, No. 22-00339-OAW, 2022 WL 3212368, at *8-11 (D. Conn. Aug. 9, 2022); *Cardoza v. Pullen*, No. 22-00591-SVN, 2022 WL 3212408, at *7-11; *see also Freeman v. Pullen*, No. 22-1567-OAW, 2023 WL 2329526, at *4-8 (D. Conn. Mar. 2, 2023).

But those district court cases in the Second Circuit constitute "scant" authority. *Wilford*, 2024 WL 3973063, at *7. They reflect a position that is "far from uniform." *Mason*, 2024 U.S. Dist. LEXIS 153989, at *17. They generally involve home confinement longer than Petitioner's 27 days. *Compare Tompkins*, 2022 WL 3212368, at *1-3 (one year of home confinement). And they are contrary to the jurisdictional teachings of the Third Circuit in *Cardona* and as recognized by this Court in *Tetterton*.

Also, the Second Circuit takes a more expansive view of habeas jurisdiction concerning prelease custody than the Third Circuit.[7] To illustrate, in *Tompkins*, the Connecticut district court that found a liberty interest in home confinement, reasoning that it had § 2241 jurisdiction over "conditions of confinement." *See* 2022 WL 3212368, at *3. In contrast to *Tompkins*, courts in this District that have long held that inmates cannot challenge conditions of confinement under § 2241—even during height of the COVID-19 pandemic. *See, e.g.*, *Wragg v. Ortiz*, 462 F. Supp. 3d 476, 503-505 (D.N.J. 2020) ("unconstitutional conditions of confinement" is "a type of challenge that neither the Supreme Court nor the Third Circuit has yet recognized as a cognizable habeas claim") (Bumb, C.J.). Only civil immigration detainees (not

[7] *See Wilford*, 2024 WL 3973063, at *9 (noting that "the Second Circuit consistently has found that individuals have a liberty interest in remaining in various community confinement programs." (quotations omitted)); *See also Shah*, 2023 WL 1794891, at *3 (rejecting Petitioner's reliance on *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235 (3d Cir. 2005) in seeking CARES Act home confinement because of the Third Circuit more recent decision in *Cardona*. This Court made a similar observation in *Romano*, noting that *Cardona* limited the jurisdictional reach of *Woodall*. *See* 2023 WL 3303450, at *4.

inmates) are permitted to make condition-of-confinement challenges under § 2241 in "extraordinary circumstances." *See Hope v. Warden York County Prison*, 972 F.3d 310, 324-25 (3d Cir. 2020).

Petitioner's Second Circuit-based decisions also rest on a dubious factual assumption. BOP staff members cannot create binding constitutional "promises" to inmates concerning CARES Act home confinement. Congress (not BOP) created home confinement, and if Congress wanted to create an entitlement to CARES Act home confinement, it could have done so. As reflected in the First Step Act, Congress is very active in prison administration and is acutely aware of how and when to create "promises" to inmates in the form of incentive programs, such as good conduct time under 18 U.S.C. § 3624(b) and earned time credits under §§ 3631-3635. Petitioner arguments underestimate Congress's active role in regulating prison life and invite courts to substitute their own judgment for that of Congress, which this Court should decline to do.

Wilford is one example in which a court rejected Petitioner's "implicit promise" argument under similar circumstances. In *Wilford*, BOP placed the petitioner on CARES Act home confinement but later revoked that home confinement without any alleged notice of "any incident report or rule violation write-up." 2024 WL 3973063, at *1. The petitioner in *Wilford* argued that BOP's revocation without notice constituted a due process violation, but the district court in *Wilford* rejected that argument. The court emphasized that "a designation of a place of imprisonment . . . is not reviewable by any court." 2024 WL 3973063, at *3. The district court further

observed that BOP's expanded discretion under "[t]he CARES Act did not alter" BOP's statutory discretion. *Id.* at *3. Accordingly, the *Wilford* court rejected the petitioner's liberty-interest claim, noting that "the CARES Act itself [is not] an alleged source of a liberty interest in remaining on home confinement." *Id.* at *9. Thus, the court in *Wilford* denied the petitioner's habeas relief. The *Wilford* decision is persuasive because the facts are similar to here, and *Wilford* is consistent with Third Circuit precedent.

Petitioner Cannot Satisfy the *Sandin* Test. As Chief Judge Bumb recognized in *Shah*, Petitioner cannot satisfy the Supreme Court's standard for recognizing a liberty interest under *Sandin v. Conner*, 515 U.S. 472 (1995). In *Sandin*, the Supreme Court established the test to create a liberty interest for inmate based on "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life" to create a liberty interest. *See Shah*, 2023 WL 1794891, at *2 (citing *Sandin*, 515 U.S. at 480-81). However, "*Sandin* does not permit [courts] to compare [a] prisoner's own life before and after the alleged deprivation" but, instead, requires courts to "compare the prisoner's liberties after the alleged deprivation with the normal incidents of prison life." *Asquith v. Dep't of Corr.*, 186 F.3d 407, 412 (3d Cir. 1999). Therefore, under this standard, a petitioner "does not have a due process right to serve a portion of his prison sentence in . . . home confinement . . . ." *Shah*, 2023 WL 1794891, at *2.

There is No "Promise" in the Summary Judgment Record. Even if the Court were inclined to make new law in the Third Circuit and recognize a liberty

interest in home confinement, Petitioner has no credible evidence in the record to support his claim. Petitioner alleges in his declaration that a BOP Camp Administrator at FCI Fairton, "Ms. Masters," and his case manager at Brooklyn House, "Ms. Kashmiri," informed him that he would remain in home confinement if he did not violate the conditions of his confinement. Am. Pet., Ex. 2 ¶¶ 14, 16, ECF No. 14. However, Petitioner did not seek to depose these individuals in discovery, and his second-hand account of these alleged promises is not competent evidence to defeat summary judgment. Moreover, neither of these BOP staff members had the authority to make these alleged constitutional "promises." The authority to grant home confinement usually rests with the Warden. *See* ECF No. 20-1 at 23 (home confinement referral authorized by warden).

This is a Compassionate Release "End-Run." Petitioner's circumstances involving his family and his alleged health condition, *see* Romano Decl. ¶¶ 8, 41, ECF No. 43 at 11-16, should not be the basis for creating a liberty interest in home confinement. Rather, any assessment of Petitioner's personal circumstances should be conducted by Petitioner's sentencing court through a compassionate release request under 18 U.S.C. § 3582(c)(1)(A). A compassion release request provides Petitioner with the opportunity to demonstrate why "extraordinary and compelling reasons warrant" a reduction in his sentence. § 3582(c)(1)(A)(i).

The Third Circuit has stated that inmates cannot "use § 2241 as an end-run around the compassionate release statute [] and the federal CARES Act" because it "vests in the Director of [BOP] discretion to transfer an inmate to home confinement."

Olson v. Warden Schuylkill FCI, No. 21-2436, 2022 WL 260060, at *2 (3d Cir. Jan. 27, 2022) (citations omitted) (non-precedential). Petitioner's § 2241 petition before this Court is just that. Petitioner has made multiple submissions in support of his compassionate release with his sentencing court based on his alleged health condition, and his request is "fully briefed" and pending. *See Romano*, No. 09-cr-168 (E.D.N.Y.), ECF Nos. 529, 537, 548, 551, 552. This Court should not preempt that process before the sentencing court. Thus, the Court should dismiss the petition under Rule 12(b)(1) for lack of subject-matter jurisdiction or grant summary judgment in favor of Respondent under Rule 56(a).

III. The Petition is Moot

The CARES Act's expansion of BOP's home confinement authority under 18 U.S.C. § 3624(c) expired when the COVID-19 emergency ended. As a result, BOP no longer has the authority to transfer Petitioner to home confinement from FCI Fairton under the CARES Act. And Petitioner, who is currently serving a 240-month sentence, is not yet eligible for home confinement under the current statute, which authorizes "home confinement for the shorter of 10 percent of the term of imprisonment of that prisoner or 6 months." § 3624(c)(2). Thus, Petitioner's request for CARES Act home confinement is moot or alternatively premature. *See Cipolla v. Knight*, No. 22-2654-RMB, 2023 U.S. Dist. LEXIS 223479, at *6 (D.N.J. Dec. 15, 2023) (CARES Act home confinement claim "moot because the BOP's authority under the CARES Act expired").

During the August 27, 2024 conference, the Court highlighted the threshold issue of mootness because of the Third Circuit's recent decision in *Perri v. Warden Fort Dix FCI*. *See* ECF No. 41, Hr'g Tr. 3:19-4:17, 4:10-14, 5:20-25. The Third Circuit held in *Perri* (in the context of an *Anders* brief[8]) that it could not "provide meaningful relief" to the petitioner "because the BOP no longer has the authority to grant home confinement under the CARES Act." 2024 U.S. App. LEXIS 19284, at *3 (3d Cir. Aug. 2, 2024). Similarly, this Court questioned "what remedy [it could] grant in light of" the Third Circuit's Perri decision on mootness. ECF No. 41, Hr'g Tr. 5:20-25. The Court should answer that question now by adopting the reasoning of *Perri* and dismissing the amended petition as moot.

IV. Revoking Petitioner's 27-Day Home Confinement Was not an Abuse of Discretion

Even if this Court determined that it had jurisdiction to review the Home Confinement Committee's decision to transfer Petitioner back to FCI Fairton—which it does not—that decision was neither arbitrary nor an abuse of discretion. In July 2022, based on "extreme concerns" voiced by Petitioner's victims and the prosecuting United States Attorney's Office, the Home Confinement Committee undertook a second, individualized review of Petitioner's home confinement placement. The committee determined that Petitioner was not appropriate for home confinement based on the totality of the circumstances.

[8] *See Anders v. California*, 386 U.S. 738 (1967).

The communications between EDNY prosecutors and BOP do not undermine the appropriateness of BOP's decision regarding Petitioner's home confinement. On the contrary, the e-mails produced by Respondent in discovery reflect consideration of good faith differences of opinion between prosecutors and BOP regarding public safety. That is the opposite of acting arbitrarily. In fact, consistent with the dialogue between BOP and prosecutors, "the inmate's crime of conviction and assessment of the danger posed by the inmate to the community" is a factor enumerated in the Attorney General's March 26, 2020 Home Confinement Memorandum.

Nor do the prosecutors' communications reflect a singling out of Petitioner. The prosecutors' public safety concerns were not limited to Petitioner—and Petitioner is not the only person to ever have his home confinement revoked for reasons other than disciplinary infractions. *See Triplett*, 2023 WL 2760829, at *1; *Wilford*, 2024 WL 3973063, at *1; ECF No. 43 at 39; Basiak Decl., Ex. 1. For example, in *Triplett*, BOP removed an inmate from home confinement because the owner of the home where he was staying mistakenly believed "that petitioner was texting with someone with whom he should not be interacting." 2023 WL 2760829, at *1. Thus, BOP did not abuse its discretion in revoking and then denying Petitioner's home confinement, and the Court should grant summary judgment in favor of Respondent.

V. Petitioner's Proposed Remedy is Too Broad

Even if the Court held that it had jurisdiction over the petition, and the petition was not moot, Petitioner's requested relief—a return to CARES Act home confinement—is too broad and premature. Rather, as the Court has already

recognized in this case, "it appears the only relief available would be to order the BOP to reassess Petitioner's eligibility for home confinement." *Romano*, 2023 U.S. Dist. LEXIS 79630, at *20 and *6 n.5; *see also Perri v. Warden of FCI Fort Dix*, No. 20-13711, 2023 U.S. Dist. LEXIS 9266, at *5 (D.N.J. Jan. 19, 2023).

CONCLUSION

For the foregoing reasons, the Court should dismiss the amended petition for lack of subject-matter jurisdiction under Rule 12(b)(1) or grant summary judgment in favor of Respondent under Rule 56(a).

Respectfully submitted,

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Dated: December 13, 2024