

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF FLORIDA  
PENSACOLA DIVISION**

**UNITED STATES OF AMERICA,**

**v.**

**Case No.: 3:04cr010/MCR**

**DAVID W. SVETE.**

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**ORDER**

This matter is before the Court on Defendant David W. Svete's motion for compassionate release. *See* ECF No. ECF No. 1179. Svete moves this Court for an order releasing him from his term of imprisonment under 18 U.S.C. § 3582(c), as amended by Section 603(b) of the First Step Act.<sup>1</sup>

**I. Background**

On March 4, 2005, a jury found Svete guilty of one count of conspiring to commit mail fraud, wire fraud, interstate transportation of stolen property, one count of money laundering, five counts of mail fraud, and three counts of interstate

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<sup>1</sup> The First Step Act went into effect on December 21, 2018. *See* FSA of 2018, Pub. L. No. 115-391, 132 Stat. 5194. Before the passage of the First Step Act, only the Director of the Bureau of Prisons could file a motion for compassionate release. Section 603(b) of the Act modified 18 U.S.C. § 3582(c)(1)(A), however, with the intent of "increasing the use and transparency of compassionate release." Pub. L. No. 115-391, 132 Stat. 5194, at \*5239 (capitalization omitted). That section now provides that a sentencing court may modify a sentence either on motion of the Director of the BOP "or upon motion of the defendant after [he] has fully exhausted all administrative rights to appeal a failure of the [BOP] to bring a motion on [his] behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility." 18 U.S.C. § 3582(c)(1)(A).

transportation of stolen property. *See* ECF No. 430. Thereafter, Svete was sentenced to 200 months imprisonment, to be followed by 3 years of supervised release. Svete has now served over 188 months in BOP custody and his projected release date is September 21, 2019, approximately two months from now.

Svete is 53 years old. His physical health has deteriorated significantly in recent years, which led him to file four requests for compassionate release with the BOP. On July 29, 2015, the BOP denied Svete's first request because it found there was no evidence that his medical diagnoses at that time—hypertension, asthma, and chronic pain from degenerative arthritis—rendered him unable to perform the activities of daily living and, thus, did not constitute “debilitated medical conditions.” *See* ECF No. 1179-1. On April 6, 2017, the BOP denied Svete's second request because it found, again, that his medical conditions—this time, chronic pain syndrome, polyneuropathy, hypertension, disturbance of visions, asthma, muscle weakness, back pain, cervicalgia, and degeneration of lumbosacral intervertebral disc—were not sufficiently debilitating to warrant compassionate relief because he was still able to perform self-care and most of his activities of daily living (*e.g.*, dressing, eating, and using the bathroom). *See* ECF No. 1179-2.

On April 1, 2019, the BOP denied Svete's third request for compassionate release. The BOP's written decision seems to acknowledge, or at least does not dispute, that Svete currently suffers from serious medical conditions—degenerative

lumber or lumbosacral intervertebral disc disease, lumbar radiculopathy, chronic pain syndrome, osteoarthritis, and polyneuropathy—that substantially diminish his ability to provide self-care. However, the BOP concluded that Svete’s conditions do not qualify for compassionate release because they “are remedial if not curable” with surgical procedures that the BOP represents were offered to Svete, but which he has declined. *See* ECF No. 1179-3. According to the Government, Svete’s fourth request for compassionate release is still under review by the BOP.

Svete filed the instant motion on May 9, 2019. He asks the Court to order his immediate release, which would reduce his sentence by about two months. The Government opposes any reduction of Svete’s sentence.

## **II. Discussion**

Svete moves for a reduction of his sentence pursuant to 18 U.S.C. § 3582(c)(1)(A), which permits a sentencing court to grant such a motion where “extraordinary and compelling reasons warrant such a reduction” and “a reduction [would be] consistent with applicable policy statements issued by the Sentencing Commission.” The policy statements applicable to this case provide, in relevant part, that “extraordinary and compelling reasons exist” where a defendant is suffering from “a terminal illness (*i.e.*, a serious and advanced illness with an end of life trajectory)” or “a serious physical or medical condition . . . that substantially diminishes [his] ability . . . to provide self-care within the environment of a

correctional facility and from which [he] is not expected to recover.” *See* U.S.S.G. § 1B1.13 cmt. n.1(A). The Sentencing Commission also directs courts to consider whether the defendant poses “a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g),” as well as “the factors set forth in 18 U.S.C. § 3553(a), to the extent they are applicable.” *See* U.S.S.G. § 1B1.13.

**A. Medical Criteria for a Reduction in Sentence**

The Court first considers whether Svete meets the medical criteria for a reduction in sentence. To begin with, there can be no dispute that Svete is presently suffering from serious and progressively worsening medical conditions. As of April 2019, according to the BOP, Svete’s diagnoses included asthma, degenerative lumbar or lumbosacral intervertebral disc disease, chronic pain syndrome, osteoarthritis, and polyneuropathy. *See* Hyle Memo, ECF No. 1179-3. More significantly, the record reflects that Svete sustained a traumatic phrenic nerve injury in October 2016, which has led to bilateral diaphragmatic dysfunction and paralysis. These latter conditions have reduced Svete’s lung capacity and severely impair his ability to breathe. *See, e.g.*, University of Kentucky Pulmonary Testing Results, ECF No. 1186-2 at 16 (pulmonary testing results showing “very severe airflow obstruction”). For example, Svete must remain seated in an upright position at all times, even while sleeping, because he cannot breathe when bending or lying prone. Without appropriate treatment, Svete’s conditions will likely continue to deteriorate.

*See* Dr. Kaufman Letter, ECF No. 1186-2 at 30. In the meantime, Svete “is extremely susceptible to severe[] and possibly life threatening respiratory infections.” *Id.* Based on these facts, the Court finds that Svete’s physical condition is sufficiently serious to satisfy the medical criteria for a reduction in sentence.

Second, there is no dispute that Svete’s serious physical condition substantially diminishes his ability to provide self-care within the correctional facility. Svete has been confined to a wheelchair—unable to walk or stand—since August 2014. *See* BOP Complete Clinical Summary, ECF No. 1186-1 at 27. In May 2016, Dr. Leonardo F. Giron, M.D., a BOP physician, observed that, at least as of that time, Svete could not “move his right lower extremity at all” and could only “move his left lower extremity very slightly.” *See id.* Svete represents that he is now “a full quadriplegic,” *see* Svete Affidavit, ECF No. 1186-1 at 4, and there is no evidence to the contrary. Indeed, the parties agree that, due to Svete’s physical condition, he requires the full-time assistance of an inmate companion for all of his activities of daily living, including bathing, dressing, toileting, and eating. *See, e.g.*, BOP Health Services Evaluation, ECF No. 1186-1 at 19. Under these circumstances, the Court finds that Svete’s ability to provide self-care within the prison environment is substantially diminished by his serious physical condition.

The third criterion for a reduction in sentence—that the defendant’s serious physical condition be one from which he is not expected to recover—is the main

point of contention in this case. The Government argues that Svete cannot meet this standard because he refused surgical procedures offered by BOP doctors, including phrenic nerve plication and “surgery to correct the problem of his spine,” *see* Hyle BOP Memorandum, ECF No. 1186-3 at 21, which the BOP doctors “believe would provide relief for [Svete’s] condition[s], if not cure [them] altogether,” *see* Government’s Brief, ECF No. 1179 at 4.<sup>2</sup>

Before addressing the merits of the Government’s argument, it is worth clarifying what is *not* in dispute. The Government does not dispute the fact that Svete is not expected to recover from his degenerative disc disease and bilateral diaphragmatic paralysis absent medical intervention. There also is no dispute that Svete’s health will continue to deteriorate if these conditions are left untreated. Thus, for purposes of this challenge at least, the only dispute is whether Svete is disqualified from receiving a sentencing reduction under 18 U.S.C. § 3582(c)(1) because he declined the course of treatment recommended by the BOP. The Court finds he is not.

First, the Government overstates the BOP doctors’ medical opinions regarding the plication procedure a bit. In the medical records submitted in

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<sup>2</sup> The parties also disagree on whether Svete suffers from a “terminal illness,” as defined in 18 U.S.C. § 3582(d)(1) and U.S.S.G. § 1B1.13 cmt. n.1(A)(i). The Court need not resolve this dispute—and does not express an opinion on the issue—because it finds that Svete qualifies for a reduction in sentence under a separate provision, § 1B1.13 cmt. n.1(A)(ii).

connection with the instant motion, none of Svete's treating physicians characterized plication, either explicitly or implicitly, as the "key" to Svete's "recovery, if not total cure." *See* Government's Brief, ECF No. 1179 at 4. At most, the physicians recommended plication as one treatment option that may improve Svete's breathing, although to what degree is unclear.<sup>3</sup> At least one pulmonary specialist observed that plication "does not always work" and discussed other possible treatment options with Svete, such as phrenic nerve pacers. *See* Pulmonary Clinic Patient Notes, ECF No. 1186-2 at 22, 29. On this record, it cannot fairly be said that the physicians involved in Svete's care opined that his bilateral diaphragmatic paralysis would be "correct[ed]" or "cur[ed]" by phrenic nerve plication. *See* Hyle BOP Memorandum, ECF No. 1186-3 at 21.

Second, Svete has offered evidence of a possible alternative treatment, phrenic nerve reconstruction, that may reverse his diaphragmatic paralysis and restore normal function to his respiratory system. Another possible treatment involves the implantation of a diaphragm pacemaker, which essentially substitutes for a ventilator and enables patients to breathe independently. Neither of these

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<sup>3</sup> *See, e.g.*, Pulmonary Clinic Established Patient Note dated April 16, 2018, ECF No. 1186-2 at 28 (stating that "diaphragmatic plication . . . may be quite helpful to Svete"); Cardiothoracic Surgery New Patient Note dated April 10, 2018, ECF No. 1186-2 at 24 (stating that "plication of right hemidiaphragm . . . will remarkably improve his pulmonary function"); Pulmonary Clinic New Patient Note dated January 22, 2018, ECF No. 1186-2 at 22 (stating that Svete "might benefit from plication although this does not always work").

procedures is available to Svete while he is incarcerated.<sup>4</sup> More importantly, neither is available to individuals who have previously undergone the plication procedure recommended by BOP. *See* ECF No. 1186-2 at 47. In other words, if Svete underwent phrenic nerve plication, he would be foreclosed from pursuing potentially viable treatment options when he is released.<sup>5</sup> The Court finds this to be a legitimate reason to decline the plication surgery, particularly since Svete's current projected release date is now only two months away.

Finally, even if the plication surgery could resolve Svete's respiratory conditions, it would not address the severe degenerative disease and lumbar radiculopathy that have caused generalized muscle paralysis throughout his body. *See* BOP Physical Therapy Evaluation, ECF No. 1186-1 at 19; BOP Clinical Summary, ECF No. 1186-1 at 27. The medical records submitted in connection with

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<sup>4</sup> In October 2018, Dr. Matthew R. Kaufman, a specialist in phrenic nerve reconstruction surgery with the Institute for Advanced Reconstruction and the David Geffen School of Medicine at the University of California, Los Angeles, requested that Svete be allowed to see him for a consultation "as soon as possible." *See* Kaufman Letter, ECF No. 1186-2 at 30. Based on the BOP's subsequent determination that plication was the appropriate treatment, *see* Hyle BOP Memorandum, ECF No. 1186-3 at 21, the Court infers that Dr. Kaufman's request was denied. Moreover, although the BOP's pulmonary specialist discussed the possibility of diaphragm pacemakers, he does not appear to have taken any steps to determine whether Svete was an appropriate candidate for that procedure; instead, he suggested that Svete and his family investigate the option on their own. *See* Pulmonary Established Patient Note, ECF No. 1186-2 at 29.

<sup>5</sup> Of course, it may turn out that Svete is not a good candidate for either phrenic nerve reconstruction or a diaphragm pacemaker. In the Court's view, however, that determination should be made by qualified medical professionals rather than the lawyers involved at the various stages of this case.

the instant motion detail the “marked” degenerative changes and hypertrophy in Svete’s cervical, thoracic, and lumbar spines,<sup>6</sup> which have now rendered him a virtual quadriplegic. None of the medical records mention, much less recommend, any surgical means of correcting or alleviating these conditions.<sup>7</sup> To the contrary, Dr. Leonardo F. Giron, a BOP Regional Physician, offered his clinical opinion that, due to these physical conditions, Svete met the medical criteria for a reduction in sentence as of May 2016. *See Complete Clinical Summary*, ECF No. 1186-1 at 27. Based on this evidentiary record, the Court concludes that Svete degenerative spinal conditions are permanent.

For these reasons, the Court finds that Svete’s decision to decline phrenic nerve plication does not disqualify him from receiving a sentencing reduction under 18 U.S.C. § 3582(c)(1). In light of the objective medical evidence regarding the severity of Svete’s degenerative disc disease and bilateral diaphragmatic paralysis,

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<sup>6</sup> *See, e.g.*, Dr. Leonardo F. Giron Complete Clinical Summary dated May 18, 2016, ECF No. 1186-1 at 27; Dr. Gregory T. Vanley Radiology Report dated October 2, 2014, ECF No. 1186-1 at 24-26; University of Maryland Radiology Report dated August 19, 2014, ECF No. 1186-1 at 22; University of Maryland Radiology Report dated October 3, 2013, ECF No. 1186-1 at 23; University of Maryland Radiology Report dated August 1, 2012, ECF No. 1186-1 at 21.

<sup>7</sup> The Court has not been presented with an evidentiary basis for the BOP’s position that Svete “has been recommended for surgery to correct the problem of his spine.” *See Hyle BOP Memorandum*, ECF No. 1186-3 at 21. None of the medical records submitted in connection with the instant motion reference any such surgery—indeed, the only surgical procedure referenced in the current record is the phrenic nerve plication. Notably, the Government was directed to “supplement the record with medical documentation and descriptions of . . . their experts’ proposed course of surgical treatment for Svete’s conditions. . . in terms of the specific procedures contemplated and the resulting prognosis.” *See Order*, ECF No. 1180 at 2. The Government did not supplement the record.

the Court concludes that Svete is suffering from serious physical conditions that substantially diminish his ability to provide self-care in the prison environment and from which he is not expected to recover. Accordingly, the Court finds that Svete satisfies the medical criteria for a reduction in sentence under 18 U.S.C. § 3582(c)(1)(A)(i) and U.S.S.G. § 1B1.13(1)(A).

**B. Dangerousness**

The Court next considers whether Svete presents “a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g).” *See* U.S.S.G. § 1B1.13(2). Factors relevant to this inquiry include: (1) the nature and circumstances of the offense charged; (2) the weight of the evidence; (3) the defendant’s history and characteristics; and (4) the nature and seriousness of the danger posed by the defendant’s release. *See* 18 U.S.C. § 3142(g).

Applying these factors in this case, the Court is hesitant to find that Svete poses no risk at all to the community—based on the nature and circumstances of his offenses and the weight of the evidence introduced at trial. However, given Svete’s serious health problems and the substantial amount of time he has already served, factors which are now a part of his history and characteristics, the Court finds that the risk of him engaging in further fraudulent conduct is minimal and can be managed by the terms of his supervised release. *See id.* (stating that conditions of release can mitigate danger to the community). Svete will be on supervised release

for three years, and the standard and special conditions previously imposed will result in substantial oversight by the United States Probation Office. *See* Amended Judgment, ECF No. 593 at 1, 3-5. With appropriate supervision, the Court concludes that Svete “is not a danger to the safety of any other person or the community, as provided in 18 U.S.C. § 3142(g).” *See* U.S.S.G. § 1B1.13(2).

### **C. § 3553(a) Factors**

The final criteria for a reduction in sentence requires the Court to consider whether a reduction is consistent with the applicable § 3553(a) factors. *See* U.S.S.G. § 1B1.13. The applicable statutory factors include, among others: the defendant’s history and characteristics, the need to provide him with any required medical treatment in the most effective manner, the need for the sentence to reflect the seriousness of the defendant’s crimes, the need to avoid unwarranted disparities in sentences between similarly situated individuals, and the related needs to provide adequate deterrence to criminal conduct and to promote respect for the law. *See* 18 U.S.C. § 3553(a).

In this case, Svete’s crimes were very serious. His fraudulent conduct was extensive and inflicted considerable harm on his victims—companies controlled by him “obtained more than one hundred million dollars from more than 3000 investors, more than a third of whom were over the age of 65.” *See United States v. Svete*, 556 F.3d 1157, 1160 (11th Cir. 2009). But Svete has been in BOP custody since 2005,

nearly 14 years. That is a significant sanction. Once released, Svete will be on supervised release for three years, which will serve as a continued sanction and general deterrent. The Court finds that further incarceration—for the approximately two months remaining on Svete’s original sentence—is not needed to deter him from committing further offenses or to promote respect for the law; nor, for the reasons already discussed, is it necessary to protect the public from future crimes.

As to Svete’s current history and characteristics, the Court has already found that the severity of his physical conditions weighs in favor of a reduction in sentence. Releasing Svete also will serve the interest of providing him with the most effective medical care. The Eighth Amendment guarantees inmates in BOP custody the right to adequate medical care for a serious medical need. *See Farmer v. Brennan*, 511 U.S. 825, 832 (1994); *Estelle v. Gamble*, 429 U.S. 97, 103-05 (1976). It does not require that the BOP provide optimal medical care or the care of an inmate’s choosing. *Harris v. Thigpen*, 941 F.2d 1495, 1510 (11th Cir. 1991). A reduction of Svete’s sentence will enable him to seek, from the doctors and hospitals of his choice, what may be better medical care than the BOP is obligated or able to provide.

Finally, Svete has served much of his sentence while seriously ill and in physical discomfort. “This means that his sentence has been significantly more laborious than that served by most inmates. It also means that further incarceration in his condition would be greater than necessary to serve the purposes of punishment

set forth in § 3553(a)(2).” *United States v. McGraw*, No. 2:02cr018, 2019 WL 2059488, at \*5 (S.D. Ind. May 9, 2019). On balance, the Court concludes that the applicable § 3553(a) factors support Svete’s request for a reduction in sentence.

### III. Conclusion

Pursuant to 18 U.S.C. § 3582(c)(1)(A)(i), the Court finds that extraordinary and compelling reasons warrant a reduction of Svete’s sentence, that Svete does not pose a danger to any other person or the community under the conditions of release, that the § 3553(a) factors support a reduction, and that the reduction is consistent with the Sentencing Commission’s policy statements.

Accordingly, it is **ORDERED**:

1. Defendant David W. Svete’s Motion for Compassionate Release, ECF No. 1177, is **GRANTED**.
2. Svete’s sentence of imprisonment is hereby reduced to time served, effective July 16, 2019, with supervised release for 3 years to follow on the terms and condition originally imposed, *see* Amended Judgment, ECF No. 593.
3. The Federal Bureau of Prisons is directed to release Svete to the custody of his mother, Joyce Svete, at **10:00 a.m. on July 17, 2019**.<sup>8</sup> Svete is responsible for arranging his own transportation to his mother’s residence in Ohio and, once released, must proceed directly there.

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<sup>8</sup> This approach will give the BOP time to receive and implement this Order, and give the United States Probation Office time to approve an itinerary for Svete’s immediate return to his mother’s home in Ohio. It will also expedite Svete’s return home by assuring that he is not transported in the usual manner by the BOP, which would involve a lengthy bus trip with stops at BOP facilities that may not be familiar with, or able to meet, the medical needs that justify Svete’s early release. That process would be inconsistent with the primary purpose of this decision.

4. On his release from the custody of the Federal Bureau of Prisons, Svete must begin serving the 3-year term of supervised release previously imposed. Svete must report in person to the United States Probation Office within 72 hours of his release.

**SO ORDERED**, on this 11th day of July, 2019.

*M. Casey Rodgers*

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**M. CASEY RODGERS**  
**UNITED STATES DISTRICT JUDGE**