

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

U.S. DISTRICT COURT
DISTRICT OF MASS.

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FILED
IN CLERKS OFFICE

UNITED STATES OF AMERICA

v.

Case No. 4:12-cr-40064

GEOFFREY PORTWAY

MOTION FOR COMPASSIONATE RELEASE AND
REDUCTION IN SENTENCE UNDER 18 U.S.C. § 3582

I. Introduction

Defendant Geoffrey Portway ("Mr. Portway")

proceeds pro se and respectfully moves this Court to consider his compassionate release to time served and to safely return to England by deportation. The United States, and the entire world, is grappling with an unprecedented pandemic. In the United States alone, there are more than 6.5 million confirmed cases and over 200,000 deaths from COVID-19. Individuals who

are obese with pre-existing medical conditions have been shown to have a higher risk of serious complications associated with COVID infection. Given Mr. Portway's obesity, diabetes, hypertension, and compromised immune system, he is at the highest risk for a severe or fatal reaction to COVID. Mr. Portway is at FCI Petersburg Medium, which has had over 40 recently confirmed cases of COVID in both inmates and staff including the recent fatality of 56 year old Tom Fisk who died handcuffed to a bed on a ventilator at a local hospital. See Bureau of Prisons, COVID-19 Coronavirus <https://www.bop.gov/coronavirus/>. Mr. Portway has served over 8 years of his 320 month sentence with extensive evidence of post-sentencing rehabilitation. Mr. Portway posits that this motion should be granted because

the global pandemic combined with his debilitating medical condition and obesity present an "extraordinary and compelling reason" for compassionate release under 18 U.S.C. § 3582 (c)(1)(A). Presently, the only known mechanisms for preventing infection are mask wearing, social distancing, and avoiding crowds. With the exception of mask wearing, such mechanisms are all but impossible within the confines of an overcrowded federal prison. COVID thrives in densely packed populations. FCI Petersburg is ill-equipped to contain its COVID outbreak and prevent COVID from spreading to inmates like Mr. Portway. Compassionate release is therefore a prudent and just response to the extraordinary and compelling circumstances created by the novel coronavirus.

II. Relevant Background

On July 27, 2012, Mr. Portway was arrested and appeared before this Court and later pled guilty to, and was convicted of, solicitation to commit a crime of violence and possession and distribution of child pornography and this Court sentenced him to 320 months in prison to be followed by a life term of supervised release. ECF 56.

The Court also imposed restitution and ordered that Mr. Portway forfeit certain property. Id.

In October 2013, Mr. Portway was designated by the United States Federal Bureau of Prisons ("FBOP") and transferred to USP Tucson to serve his sentence.

Shortly thereafter, Mr. Portway began participating in multiple post-sentencing rehabilitation programs, see Attachment 1 (recent FBOP program review and re-entry plan). Mr. Portway also

began participating in FBOP's Financial Responsibility Program to pay down the special assessment fees and restitution penalties imposed on him by this Court Id.

Prison officials also assessed Mr. Portway's health and medical conditions and he was diagnosed as having diabetes and hypertension. Id.; see also Attachment 2 (current medical records). Mr. Portway was also determined to be obese and he was placed on chronic care. Id.

On March 24, 2015, Immigration Officials filed an order (file no. A022221580) that Mr. Portway be deported to England. See Attachment 1 (recent program review citing a pending detainer for deportation proceedings).

In July 2017, Mr. Portway was transferred to FCC Petersburg Medium and continued to participate in post-sentencing rehabilitation programs. Id. By December 2019,

Mr. Portway completed the FBOP's Financial Responsibility Program by paying his court-imposed special assessment and restitution amounts in full. Id. By December 2019, Mr. Portway had also taken multiple steps to accomplish an International Treaty Transfer Application after working with the British Consulate, see Attachment 3, and program officials of the Prisoners Abroad Program, see Attachment 4, to implement a proposed concrete plan of his transition that ensures the safety and interests of the British Community and those of Mr. Portway becoming a lawful and productive member of that community.

In early-2020, the COVID-19 pandemic plagued the United States quickly infecting thousands of Americans and hundreds began dying as a result. COVID related infections and deaths mounted quickly as expert medical officials quickly

scrambled to contain the COVID infections and deaths.

By April 1, 2020, hundreds in federal prison staff and inmates had contracted COVID and at least 3 inmates had died.

Federal Prison Officials quickly responded by locking inmates in their cells continuously and allowing inmates only 5 minute showers only three times a week. Mr. Portway knew very little about COVID or why he was being locked in his cell.

FCC Petersburg prison officials ceased all operations and program activities through the month that followed. By July 2020, Mr. Portway was allowed out of his cell for a few hours each day and allowed recreation activity for one hour three times each week. At least two confirmed COVID cases of COVID had revealed themselves at FCC Petersburg Complex.

In September 2020, FCC Petersburg Medium began its first outbreak of COVID reaching 23 confirmed cases and

the death of 56 year old federal inmate Tom Fisk who died handcuffed to a hospital bed on a ventilator at a nearby hospital.

Prison Officials returned to locking inmates in their cells continuously. Mr. Portway learned from news reports that those at highest risk of having severe complications to COVID are those with medical conditions. Mr. Portway also discovered that Inmate Fisk had diabetes and hypertension.

On October 5, 2020, Mr. Portway submitted a compassionate release request to Warden Justin Andrews of FCC Petersburg Medium asserting that his prison conditions and medical conditions put him at the highest risk of having complications making it impossible to provide himself self-care to ensure his safety. Attachment 5. By November 5, 2020, Mr. Portway had not received a response from Warden Andrews to his compassionate release.

This motion follows.

III. Argument

A. The Court has jurisdiction to grant Mr. Portway's release and allow him to be deported

On December 21, 2018 the First Step Act became law and amended 18 U.S.C. § 3582(c)(1)(A)(i) to allow defendants to move for a reduction of sentence based extraordinary and compelling reasons whenever "the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf," or after "the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier."¹ First Step Act of 2018, § 603(b), Pub L. 115-391, 132 Stat. 5194, 5239 (Dec. 21, 2018) (emphasis added). By providing this short 30-day waiting period, Congress sought to expedite judicial consideration of such motions and expedite defendants'

access to the courts. See, e.g., United States v. Haney,
19-cr-541, 2020 WL 1821988 at 3 (S.D.N.Y. Apr. 13, 2020),

Here, Mr. Portway has waited more than 30 days after
he submitted his compassionate release request on October 5,
2020. See Attachment 5. The 30-day exhaustion period begins
when the defendant submits his request for compassionate
release to FBOP staff. See, e.g., United States v. Somerville,
2020 WL 2781585 at 3 n.2 (W.D. Pa. May 29, 2020);
United States v. Resnick, 2020 WL 1651508 at 6 (S.D.N.Y.,
Apr. 2, 2020). Courts have also found that the exhaustion
requirement is satisfied upon the passage of 30 days since
a prisoner's request for compassionate release, regardless
of whether the FBOP issues a denial of the request in
the meantime. See, e.g., United States v. Wilson, No.
2:11-cr-180, ECF 663 at 4-5 (E.D. Va. May 29, 2020) (finding

exhaustion satisfied where defendant submitted compassionate release request to the warden on March 27, 2020, which was subsequently denied on April 10, 2020 within 30 days of the request); United States v. Haney, 2020 WL 1821988 at 3 (S.D.N.Y. Apr. 13, 2020) ("Rather, it requires the defendant either to exhaust administrative remedies or simply to wait 30 days after serving his petition on the warden of the facility before filing a motion."); United States v. Soto, No. 1:18-cr-10086, 2020 WL 1905323 at 4 (D. Mass. Apr. 17, 2020). Moreover, it is the "official position of the Department of Justice and the Bureau of Prisons [that]: a defendant can file a motion for compassionate release in district court 30 days after requesting relief from the Warden, even if the Warden denies the relief within 30 days." See, e.g., Gov't Supplemental Response to

Def. Mot. for Compassionate Release, United States v. Andre

Woodson, No. 1:13-cr-20180, ECF 402 at 2 (S.D. Fla.

June 5, 2020). Because 30 days have passed since Mr.

Portway submitted his compassionate release request to the

Warden here, he therefore satisfies the exhaustion

requirement contained in 18 U.S.C. § 3582(c) and his

motion is properly before this Court to be reviewed.

B. The Court has statutory authority to decide whether "extraordinary and compelling reasons" exist in this case

This Court has the authority to order Mr. Portway's immediate release to his deportation detainer and subsequent

proceedings. Title 18 U.S.C. § 3582(c)(1)(A)(i) states in

relevant part that the Court "may reduce the term of

imprisonment, after considering the factors set forth in

[18 U.S.C. §] 3553(a) to the extent they are applicable,

if it finds that... extraordinary and compelling reasons warrant such a reduction... and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission[.]”

When enacting § 3582(c) as part of the Crime Control Act of 1984, Congress tasked the Sentencing Commission with defining the phrase “extraordinary and compelling,” and also required that any judicial order modifying a sentence be “consistent with applicable policy statements” issued by the Sentencing Commission. See 28 U.S.C. § 994(+). The Sentencing Commission followed the directive and issued a policy statement, but that policy statement has not been updated to reflect changes made by the First Step Act because there have not been enough commissioners to update the

Commission's policies or amend the Sentencing Guidelines.

See United States v. Brown, No. 4:05-cr-227, 2019 WL

4942051 at 2 n.1 (S.D. Iowa Oct. 8, 2019) ("As district

courts have noted often this year, the Sentencing

Commission has not amended the Guidelines following

the First Step Act and cannot do so until it again has

four voting commissioners."). In point of fact, the Second

Circuit recently held that the guideline policy statements

related to compassionate release do not apply. United

States v. Brooks, No. 19-3218 (2d Cir. Sept. 25, 2020).

The Commission's current policy statement further sets forth the following factual considerations for determining

whether compassionate release is appropriate: (i) the

medical condition of the defendant (including terminal

illness and other serious conditions and impairments;

(ii) the age of the defendant (for those 65 and older with serious deterioration related to aging who have completed at least 10 years or 75 percent of the term of imprisonment);

(iii) the family circumstances of the defendant (where a child's caregiver or spouse dies or becomes incapacitated without an alternative caregiver); and (iv) "other reasons" as determined by the FBOP. U.S.S.G. § 1B1.13, Application Note 1(A). The fourth category specifically includes "an extraordinary and compelling reason other than, or in combination with," the first three. Id. The commentary also makes clear that the extraordinary and compelling reasons "need not have been unforeseen at the time of sentencing in order to warrant a reduction in the term of imprisonment." U.S.S.G. § 1B1.13, Application Note 2. In other words, even if an "extraordinary and compelling reason

reasonably could have been known or anticipated by the sentencing court, [that fact] does not preclude consideration for a [sentencing] reduction." Id.

It is the Court's role to determine what "other reasons" warrant compassionate release, notwithstanding the Commission's outdated policy statement that provided for the FBOP to make that determination. "Under the First Step Act, it is for the Court, not the Director of the Bureau of Prisons, to determine whether there is an 'extraordinary and compelling reason' to reduce a sentence." United States v. Maumau, No. 2:08-cr-758, 2020 WL 806121 at 7-8 (D. Utah Feb. 18, 2020). Indeed, multiple courts have recognized the judicial authority to find that compassionate release is warranted for "other reasons" than those set forth in U.S.S.G. § 1B1.13. See, e.g., United States v. Redd, No.

1:17-cr-6, 2020 WL 1248493 at 8 (E.D. Va. Mar. 16, 2020)

(concluding that "the Court joins other courts in concluding

that a court may find, independent of any motion,

determination or recommendation by the BOP Director, that

extraordinary and compelling reasons exist based on facts

and circumstances other than those set forth in U.S.S.G.

§ 1B1.13 cmt. n.1(A)-(c)"); United States v. Contu-Rivera,

No. H-89-204, 2019 WL 2578272 at 2 n.1 (S.D. Tex. June 24,

2019) (finding that "[b]ecause the current version of the

Guideline policy statement conflicts with the First Step Act,

the newly-enacted statutory provisions must be given

effect.") (internal citation omitted); Brooker, No. 19-3218

(same).

Not only can the Court exercise its discretion to

determine that "other reasons" amount to "extraordinary

and compelling reasons" under U.S.S.G. § 1B1.13 Application Note 1(D), the "catchall provision," but another provision of the Guidelines calls for Mr. Portway's release in this case as well. Mr. Portway suffers from obesity, diabetes, and high blood pressure, which the CDC has concluded put him at high risk for a severe reaction to COVID. See Centers for Disease Control and Prevention, People with Moderate to Severe Asthma, Aug. 27, 2020 <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/asthma.html>.

Accordingly, as the government has conceded in other jurisdictions, see below, Mr. Portway is "suffering from a serious physical or medical condition" . . . "that substantially diminishes [his] ability . . . to provide self-care within the environment of the correctional facility and from which he . . . is not expected to recover."

U.S.S.G. § 1B1.13 Application Note 1(A)(ii)(1). Therefore, Mr. Portway's compassionate release is predicated on his medical condition, see U.S.S.G. § 1B1.13 Application Note 1(A)(ii)(1), in addition to "other reasons" to be determined by this Court, see U.S.S.G. § 1B1.13 Application Note 1(D).

C. There are extraordinary and compelling reasons to release Mr. Portway in this case to his deportation detainer

1. Mr. Portway's health conditions place him at high risk of serious COVID-19 complications

Mr. Portway suffers from obesity (his body mass index is at least 30), diabetes—specifically Type 2 diabetes, and hypertension (high blood pressure). See Attachment 2 (sample of voluminous medical records from FBOP medical staff).

According to the CDC, the following groups are at increased risk for severe illness or death: (1) older adults; and (2) people with certain medical conditions. The risk for severe illness from COVID increases with age, with older adults at the highest risk. People with the following medical conditions are at the highest risk: (1) cancer; (2) chronic kidney disease; (3) COPD; (4) immunocompromised state from a solid organ transplant; (5) obesity (body mass index of 30 or higher); (6) serious heart conditions; (7) sickle cell disease; and (8) Type 2 diabetes. See CDC, People at Increased Risk for Severe Illness, available at <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/index.html>.

According to ever-developing data and research, people with the following conditions or risk factors may also

face an increased risk: (1) asthma; (2) cerebrovascular disease; (3) cystic fibrosis; (4) hypertension or high blood pressure; (5) immunocompromised state from blood or bone marrow transplant, immune deficiencies, HIV, use of corticosteroids, or use of other immune weakening medicines; (6) neurologic conditions, such as dementia; (7) liver disease; (8) pregnancy; (9) pulmonary fibrosis; (10) smoking; (11) thalassemia (a blood disorder); and (12) Type 1 diabetes. Id.

The CDC has further recognized that the above groups need extra precautions, but place Type 2 diabetes in the highest risk category for a severe or fatal reaction to COVID. See Zuntou Wu and Jennifer M. McGoogan, Characteristics of and Important Lessons From the Coronavirus Disease 2019 (COVID-19) Outbreak in China:

Summary of a Report of 72,314 Cases From the Chinese

Center for Disease Control and Prevention, J. Am. Med. Assoc.

(Feb. 24, 2020), <https://jamanetwork.com/journals/jama/>

fullarticle/2762130 (finding elevated case fatality rates in

COVID patients with diabetes and hypertension); Ranganath

Muniyappa and Sriram Gubbi, COVID-19 pandemic,

coronaviruses, and diabetes mellitus, Am. J. Physiology:

Endocrinology and Metabolism 318 (Mar. 31, 2020),

[https://journals.physiology.org/doi/pdf/10.1152/](https://journals.physiology.org/doi/pdf/10.1152/ajpendo.00124.2020)

ajpendo.00124.2020 (finding that "[i]ndividuals with

diabetes mellitus (DM), hypertension, and severe obesity

(BMI ≥ 40 kg/m²) are more likely to be infected and

are at a higher risk for complications and death from

COVID-19") (citations omitted). Courts across the country

agree that such medical conditions like those of Mr. Portway

warrant granting compassionate release: See, e.g., United States v. Oaks, No. RDB-17-0288, 2020 U.S. Dist. LEXIS 109775 (D. Md. June 23, 2020) (granting compassionate release for a defendant with Type 2 diabetes, hypertension, asthma, hyperlipidemia, and arthritis); United States v. Patel, No. 3:17-cr-164, 2020 U.S. Dist. LEXIS 164348 (D. Conn. June 15, 2020) (granting compassionate release for a defendant with chronic ischemic heart disease, essential hypertension, hyperlipidemia, and Type 2 diabetes); United States v. Rivera, No. 3:13-cr-71, 2020 U.S. Dist. LEXIS 104343 (D. Conn. June 15, 2020) (granting compassionate release for a defendant with Type 2 diabetes and obesity); United States v. Colvin, No. 3:19-cr-179, 2020 U.S. Dist. LEXIS 57962 (D. Conn. Apr. 2, 2020) (granting compassionate release for a defendant with Type 2 diabetes and

hypertension); Harrell v. United States, No. 13-20198, 2020 U.S. Dist. LEXIS 92944 (E.D. Mich. May 28, 2020) (granting compassionate release for a defendant with diabetes and hypertension).

High blood pressure, also called hypertension, is blood pressure that is higher than normal. The higher the blood pressure levels, the greater the risk for other health problems, such as heart disease, heart attack, and stroke. As documented in the Allison Aubrey article, among COVID-19 patients admitted to the ICU, "29% had heart disease ... and 37% had other chronic conditions including hypertension or a history of cancer." Allison Aubrey, Who's Sickest from COVID-19? These Conditions Tied to Increased Risk, NPR (March 31, 2020), <https://www.npr.org/sections/coronavirus-liveupdates/2020/03/31/>

824846243/whos-sickest-from-covid-19-these-conditions-

tied-to-increased-risk (last visited July 14, 2020). Medical

Studies have observed that more people in the United States have multiple coexisting diseases called comorbidity.

Hypertension is one of the most commonly associated disease with severe cases of COVID, due to the coexisting

illnesses in patients who have been admitted to the

hospital and their risk of death. "High Blood Pressure

Symptoms and Causes." Centers for Disease Control and

Prevention, Centers for Disease Control and Prevention, 19

May 2020, www.cdc.gov/bloodpressure/about.htm (last

visited July 14, 2020). High blood pressure damages arteries

and reduces the flow of blood to the heart; it is more

difficult for the body to fight off the disease. Williams,

Bryan, Hypertension, Renin-Angiotensin-Aldosterone

System Inhibition, and COVID-19, The Lancet, 14 May 2020, [www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)31131-4/fulltext](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)31131-4/fulltext); Branildo Nazario, High Blood Pressure and Coronavirus (Higher-Risk People): Symptoms, Complications, Treatments (July 2, 2020), <https://www.webmd.com/lung/coronavirus-high-blood-pressure#1>.

Courts around the United States are releasing individuals with hypertension because of their COVID risk: See, e.g., United States v. Bradley, No. 2:14-cr-293, 2020 WL 3802794 (E.D. Cal. July 7, 2020) (concluding defendant's hypertension, asthma, and diabetes put him at high risk of suffering serious consequences of COVID-19); United States v. Scparta, No. 1:18-cr-578, 2020 WL 1910481 (S.D.N.Y. Apr. 20, 2020) (concluding that hypertension and high blood pressure make an inmate "especially vulnerable to

Complications from COVID-19"); United States v. Jones, No. 13-cr-577, 2020 WL 3892960 (E.D. Pa. July 9, 2020) (concluding defendant's vulnerability to COVID-19, chiefly his hypertension, is the reason for granting of the motion); United States v. Lee, No. 1:19-cr-58, 2020 WL 3422772 (E.D. Va. June 22, 2020) (concluding defendant's diabetes, hypertension, and hyperlipidemia, and family history of heart disease extraordinary and compelling reasons to grant motion); United States v. Ramirez, No. 1:17-cr-10328, 2020 WL 2402858 (D. Mass. May 12, 2020); United States v. Guzman Soto, No. 1:18-cr-10086 (D. Mass. May 1, 2020)

Recent data shows obesity to be "one of the most important predictors of severe coronavirus illness[.]" "People Who Are at Highest Risk for Severe Illness." Centers

for Disease Control and Prevention, www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html. The CDC has recognized that individuals with obesity face a higher risk of severe illness if infected with COVID. Id. Individuals with obesity are at a higher risk because obesity increases the likelihood of death as a consequence of acute respiratory distress syndrome, a serious breathing problem. Id. The syndrome can cause difficulties with a doctor's ability to provide respiratory support for seriously ill COVID patients. Id. Individuals with obesity can also have multiple serious chronic diseases and underlying health conditions that can increase the risk of severe illness from COVID. Id. Mr. Portway is obese. See Attachment 2 (FBOP staff diagnosis).

Courts in the United States are also releasing obese individuals because of their obesity: See United States v. Halliburton, No. 17-cr-20028, 2020 U.S. Dist LEXIS 162241 (C.D. Ill. June 11, 2020) (granting compassionate release for a defendant with asthma who is 5'10" and weighs 230 pounds, which according to the CDC, results in a BMI of 33); United States v. Smith, No. 15-cr-30039, 2020 U.S. Dist. LEXIS 98878 (C.D. Ill. June 5, 2020) (granting compassionate release for a severely obese defendant with hypertension, diabetes, and sleep apnea); United States v. White, No. 13-cr-20653, 2020 U.S. Dist. LEXIS 88542 (E.D. Mich. May 20, 2020) (granting compassionate release for an obese defendant with a BMI of 38.6 who was diagnosed with hypertension on May 4th); United States v. Delgado, No. 3:18-cr-17, 2020 WL 2464685 (D. Conn. Apr. 30, 2020) (granting compassionate release

to an inmate with a BMI of 40.2 who had only served 29 months of an imposed 120 month sentence); United States v. Dawson, No. 18-40085, 2020 WL 1812270 at 7 D. Kan. Apr. 9, 2020) (granting release pending sentencing to an inmate with a BMI of 51.5 because his severe obesity put him at higher risk).

The Department of Justice has issued internal guidance directing the government to concede that defendants with CDC-identified risk factors can establish "extraordinary and compelling reasons" warranting compassionate release. In multiple jurisdictions across the country, the government has complied with this explicit directive and conceded that a defendant presents "extraordinary and compelling" reasons for release where he or she has at least one risk factor recognized by the CDC, even if that typically would not be

enough during ordinary times. See United States v. Firebaugh, No. 1:16-cr-20341, ECF 43 (S.D. Fla. June 1, 2020); see also Gov't Suppl. Resp., United States v. Lint, No. 18-cr-5152, ECF 63 at 2 (W.D. Wash. June 30, 2020) (Despite no reported COVID cases at FPC Sheridan, "[t]he United States now concedes that this court may consider Lint's conditions as a 'extraordinary and compelling' reason for relief under the statute because his conditions impact the ability of the defendant to provide self-care within the environment of a correctional institution."); United States v. Hernandez, No. 04-cr-171, ECF 109 at 1-2 (E.D. Wisc. June 9, 2020) ("Consistent with the [DOJ's] litigating position in compassionate-release motions during the COVID-19 pandemic, the government concedes that Hernandez's type II diabetes diagnosis is sufficient to satisfy the

'extraordinary and compelling' standard in U.S.S.G. § 1B1.13, cmt. n.1(A), "despite no reported cases at Pekin FCI at the time of the response"); United States v. Wite, No. 1:18-cr-72, ECF 185 (D. Md. May 18, 2020) ("consistent with current DOJ policy, the Government does not contest the Defendant's eligibility for being considered for compassionate release in this case because he suffers from a condition identified by the CDC as putting him at higher risk for severe illness.");

In Firebaugh, for instance, the defendant suffered from COPD and diabetes. In light of the pandemic, the government conceded that he had "extraordinary and compelling reasons" for release, not under U.S.S.G.

§ 1B1.13 Application Note 1(D) - the "catchall provision" - but under U.S.S.G. § 1B1.13 Application Note 1(A)(ii)(I) - because

he was suffering from a "serious physical or medical condition(s)... that substantially diminished the ability of the defendant to provide self-care within the environment of a correctional facility and from which he... is not expected to recover." The government further conceded that "by having COPD and diabetes (CDC risk factors), [the defendant] has established the requisite 'medical condition' under USSG § 1B1.13, cmt. n.1(A), "even though" there are no known infections of staff or inmates...." Id. at 2-3.

Here, Mr. Portway is incarcerated at FCC Petersburg Medium where there is presently a massive COVID outbreak. See Bureau of Prisons, COVID-19 Coronavirus, <https://www.bop.gov/coronavirus/>. Mr. Portway suffers from obesity at 6'2" weighing 283 pounds, Type 2 diabetes, and hypertension, which are specifically identified on the CDC list of factors

that place him at a higher risk for a severe reaction to COVID.

Under U.S.S.G. § 1B1.13 Application Note 1(A)(ii), Mr.

Portway's underlying medical conditions substantially diminish

his ability to provide self-care — in this case, by

protecting himself from contracting COVID — because of the

conditions of confinement in prison. Even the DOJ recognizes

that FBOP facilities cannot ensure social distancing and

adequate sanitation. If a prisoner cannot practice the

recommended CDC guidelines to protect himself from COVID

such as social distancing, frequent hand-washing, sanitizing

surfaces, and wearing masks and gloves, then his ability

to protect himself from infection is substantially diminished.

Mr. Portway therefore meets the "extraordinary and compelling"

requirement in two ways: based on his medical conditions

and under the "catchall" provision, see U.S.S.G. §§ 1B1.13

Application Notes 1(A)(ii)(I) and (D). Given the DOJ's explicit directive, the government should concede that "extraordinary and compelling reasons" exist in this case.

2. COVID is present at FCC Petersburg Medium where there is an ongoing COVID outbreak and active cases

The Court is undoubtedly familiar with the threat posed by COVID, particularly in the prison setting, where social distancing and hygiene recommended by the CDC are very difficult to practice. As the Supreme Court has noted, "[j]ails are often crowded, unsanitary, and dangerous places." Florence v. Bd. of Chosen Freeholders of City of Burlington, 566 U.S. 318, 333 (2012). Not surprisingly, COVID is tearing through the FBOP at a rate exponentially higher than it is spreading elsewhere in the United States. Indeed, test results show that up to 70% of inmates in FBOP

facilities that have been tested have tested positive for COVID. Michael Balsamo, Over 70% of tested in federal prisons have COVID-19, Assoc. Press (Apr. 29, 2020), <https://www.startribune.com/over-70-of-tested-in-federal-prisons-have-covid-19/570060782/>.

As noted above, FCI Petersburg Medium has confirmed a massive COVID outbreak with hundreds of active cases and at least one death. This Court sentenced Mr. Portway to a prison sentence, not a death sentence. In granting compassionate release, many courts have acknowledged that vulnerable defendants like Mr. Portway are at grave risk despite FBOP precaution. "Even in the best run prisons, officials might find it difficult if not impossible to follow the CDC's guidelines for preventing the spread of the virus among inmates and staff: practicing fastidious hygiene and

Keeping a distance of at least six feet from others."

United States v. Esparza, No. 1:07-cr-294, 2020 WL

1696084 (D. Idaho April 7, 2020); see also United States

v. Muniz, No. 4:09-cr-199, WL 1540325 at 1 (S.D. Tex.

Mar. 30, 2020) ("[W]hile the Court is aware of the measures

taken by the [FBOP], news reports of the virus's spread in

detention centers... demonstrate that individuals housed

within our prison systems nonetheless remain particularly

vulnerable to infection.").

Even in the best circumstances, inmates cannot provide

self-care because their incarceration prevents them from

following CDC guidance: "People in jails and prisons

cannot practice social distancing, control their exposure to

large groups, practice increased hygiene, wear protective

clothing, obtain specific products for cleaning and laundry,

avoid frequently touched surfaces, or sanitize their own environment." United States v. Skelos, No. 15-cr-317, 2020 WL 1847558 at 1 (S.D.N.Y. Apr. 12, 2020). Mr. Portway's present prison conditions and given the COVID outbreak at FCC Petersburg, there are serious doubts that FBOP will be able to adequately care for prisoners as the COVID pandemic continues to unfold. Were Tom Fisk still alive, he would undoubtedly agree with this assertion.

In sum, Mr. Portway's particular susceptibility to COVID while incarcerated, in combination with the mortal risk to Mr. Portway given his medical conditions, constitute an extraordinary and compelling reason warranting Mr. Portway's compassionate release to his detainer and a sentence reduction to time served.

IV. Releasing Mr. Portway to his detainer and deportation proceedings is appropriate given his post-sentencing rehabilitation and well thought out plan of release and path of reintegration into the England Community that is safe and structured

In determining whether an individual's sentence should be reduced based on an "extraordinary and compelling reason," this Court must consider whether Mr. Portway 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). Under the present statutory regime, the existence of extraordinary and compelling circumstances confers on the Court the authority to consider the relevant 18 U.S.C. § 3553(a) factors in determining whether a sentence reduction is appropriate. Mr. Portway asserts that he poses no danger to the community given his post-sentencing rehabilitation

and fervent efforts to create and put in place a concrete and structured path to reintegration that protects the safety of himself and the England community to where he will be deported.

Since his incarceration, Mr. Portway has completed multiple post-sentencing rehabilitation programs. Attachment 1. Mr. Portway also reached out to the British Consulate to initiate responsible steps to implement a concrete and safe path to reintegrate back into the England community to where he will be deported. Attachment 3. He has also begin an application for an International Treaty Transfer given that he is eligible for such a transfer. See Attachment 1 at 2 (prison officials documenting that Mr. Portway is eligible for an International Treaty Transfer).

Mr. Portway also reached out to Amber, Elena,

Emma, Eppie, Matthew, Sara, and Sarah of Prisoners Abroad and applied for help with implementing his path of reintegration back to England. Attachment 4. Prisoner's Abroad is a non-governmental organization that provides vital services to British citizens in prisons abroad. The services are free and would work hand in hand with Mr. Portway to receive work, housing, medical care, and other vital needs to reintegrate into the community in England. Under the Sexual Offences Act of 2003, for example, in the event the Court granted this motion and Mr. Portway were released, he would first meet with the local England police to register as a sex offender. This would protect the safety and structure of Mr. Portway's reintegration process. The Prisoners Abroad Staff would also assist Mr. Portway on his path to reintegration.

Through Mr. Portway's post-sentencing rehabilitation efforts, his general reputation for good conduct in prison, and his proactive efforts to safely and responsibly reintegrate back into England by either grant of this motion or International Treaty Transfer, demonstrate his sincere capacity to change. These mitigating facts outweigh any concern that the Court may have in considering the factors in 18 U.S.C. § 3553(a) due to the nature of the convictions in this case.¹

Many other Courts have found that to be the case:

See, e.g., United States v. Williams, No. 3:04-cr-95, ECF 91

(N.D. Fla. Apr. 1, 2020) (finding compassionate release appropriate for defendant convicted of armed bank robbery and brandishing a

¹ The Court should also consider that Mr. Portway has a minimum PATTERN score showing he is at a minimum risk of reoffending were he to be released. Attachment 6 (PATTERN score).

firearm during a crime of violence who had a prior criminal history including "Six prior convictions for armed bank robbery and three prior convictions for bank robbery"); United States v. Scott, No. 7:98-cr-79, ECF 317 (E.D.N.C. Feb. 4, 2020) (granting compassionate release of defendant serving a lengthy sentence for Hobbs Act robbery and multiple counts of using and carrying a sawed-off shotgun and other firearms during and in relation to crimes of violence); United States v. Brown, No. 2:18-cr-360, ECF 35 (N.D. Ala. May 22, 2020) (granting compassionate release of defendant convicted of use of a firearm in connection with drug trafficking); United States v. Peterson, No. 7:12-cr-15, ECF 63 (E.D.N.C. June 4, 2019) (granting compassionate release of defendant whose offense included discharging a firearm in furtherance of drug distribution offense).

In sum, Mr. Portway's responsible steps at rehabilitation and reintegration efforts should reassure the Court in its consideration of granting his motion for compassionate release. While working with Prisoner's Abroad staff, law enforcement in England, and with the help and financial support of his sister, Elizabeth McKee (who can be contacted by the Court if necessary), Mr. Portway has shown he has a viable plan of release to England to be a lawful productive member of his community and move forward in his life.

V. Conclusion

Mr. Portway's motion and the Court's analysis turns of (1) whether extraordinary and compelling reasons exist; and (2) whether 18 U.S.C. § 3553(a) factors are satisfied under 18 U.S.C. § 3142(g) given the facts and law presented

to the Court in this case. Mr. Portway proposes the answer to both questions is yes and therefore asks that he be granted compassionate release to his deportation detainer in this case.

Respectfully submitted,

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