

NO. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES  
OF AMERICA

ANCE PAYTON  
Petitioner-Defendant

v.

UNITED STATES OF AMERICA  
Respondent

On Petition for Writ of Certiorari from the  
United States Court of Appeals for the Fifth Circuit.  
Fifth Circuit Case No. 21-60187

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**PETITION FOR WRIT OF CERTIORARI**

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**Omodare B. Jupiter** (MS Bar #102054)  
Federal Public Defender  
N. and S. Districts of Mississippi  
200 South Lamar Street, Suite 200-N  
Jackson, Mississippi 39201  
Telephone: 601/948-4284  
Facsimile: 601/948-5510

**Jacinta A. Hall** (MS Bar #101956)  
Assistant Federal Public Defender

Attorney for Defendant-Petitioner

## **QUESTION PRESENTED FOR REVIEW**

Whether the district court erred by denying Mr. Payton's Motion for Compassionate Release under 18 U.S.C. § 3582(c)(1)(A).

## **PARTIES TO THE PROCEEDING**

All parties to this proceeding are named in the caption of the case.

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## **I. OPINIONS BELOW**

The prosecution filed an Indictment against Mr. Payton charging him with the following nonviolent crimes:

Count 1: possession with intent to distribute illegal Schedule II narcotics, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C);

Count 2: possession with intent to distribute marijuana, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C); and

Count 3: felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

The district court dismissed Count 3 on the Motion of the prosecution.

The prosecution filed the Indictment in the United States District Court for the Southern District of Mississippi on May 15, 2018, under case number 3:18cr105-TSL-FKB. Mr. Payton accepted full responsibility for his actions by entering timely guilty pleas to Counts 1 and 2 on July 19, 2018. As stated above, Count 3 was dismissed on the prosecution's Motion.

Mr. Payton's sentencing hearing followed on November 8, 2018. The court sentenced him to serve "79 months imprisonment as to Count 1, and 60 months as to Count 2, to run concurrently to Count 1, and both counts to run consecutively to the undischarged term of imprisonment in the state case in Criminal No.: 17-400."<sup>1</sup>

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<sup>1</sup> "Criminal No.: 17-400" is a state court case.

It also ordered a total of three years' supervised release and a \$1,500 fine. The court entered a Judgment reflecting this sentence on November 19, 2018.

Mr. Payton filed a *pro se* Motion for Compassionate Release on May 4, 2020. He requested release from prison based on dangers posed by the COVID-19 pandemic. The same day that Mr. Payton filed the *pro se* Motion, the district court entered a General Order appointing the Office of the Federal Public Defender to represent him on the compassionate release issue.

After completion of briefing, the district court entered an Order denying Mr. Payton's Motion for Compassionate Release. It entered the Order on July 14, 2020. Mr. Payton did not appeal that Order.

Mr. Payton filed a second *pro se* Motion for Compassionate Release on January 5, 2021. He again requested release from prison based on dangers posed by the COVID-19 pandemic, combined with his own adverse health conditions. The same day that Mr. Payton filed the *pro se* Motion, the district court again entered a General Order appointing the Office of the Federal Public Defender to represent him on the compassionate release issue.

The prosecution filed its response to the second Motion for Compassionate Release on January 11, 2021, and the undersigned filed a Reply supporting the Motion on January 14, 2021. The district court entered an Order denying Mr.

Payton's Motion on March 2, 2021. The district court's Order is attached hereto as Appendix 1.

On March 8, 2021, Mr. Payton filed a Notice of Appeal to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit case number is 21-60187. The Fifth Circuit entered an Order affirming the district court's rulings on August 3, 2021. It filed a Judgment on the same day. The Fifth Circuit's Order and Judgment are attached hereto as composite Appendix 2. This Petition for Writ of Certiorari followed.

## **II. JURISDICTIONAL STATEMENT**

The United States Court of Appeals for the Fifth Circuit filed both its Order and its Judgment in this case on August 3, 2021. This Petition for Writ of Certiorari is filed within 90 days after entry of the Fifth Circuit's Judgment as required by Rule 13.1 of the Supreme Court Rules. This Court has jurisdiction over the case under the provisions of 28 U.S.C. § 1254(1).

### **III. STATUTE INVOLVED**

Mr. Payton's Motion for Compassionate Release is based on The First Step Act. Relevant to Mr. Payton's case is the codified portion of the First Step Act at 18 U.S.C. § 3582(c)(1)(A), which states:

The court, upon motion of the Director of the Bureau of Prisons ("BOP"), or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the [BOP] to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that extraordinary and compelling reasons warrant such a reduction . . .

#### **IV. STATEMENT OF THE CASE**

##### **A. Basis for federal jurisdiction in the court of first instance.**

This case involves a Motion for Compassionate Release because of dangers within the BOP associated with the COVID-19 pandemic. The underlying criminal conviction against Mr. Payton was for two counts of possession with intent to distribute illegal Schedule II narcotics, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C). The court of first instance, which was the United States District Court for the Southern District of Mississippi, had jurisdiction over the case under 18 U.S.C. § 3231 because the criminal charges levied against Mr. Payton arose from the laws of the United States of America.

##### **B. Statement of material facts.**

###### **1. Mr. Payton's health conditions.**

Mr. Payton's preexisting health conditions are relevant to deciding whether he should be granted compassionate release because of the COVID-19 pandemic. He suffers from high blood pressure / hypertension. He takes one Hydrochlorothiazide 25 MG tablet per day for hypertension.

Mr. Payton's weight is another health condition that supports his request for compassionate release. The BOP's medical records indicate that he has a BMI of 38.91. He also has been diagnosed a prediabetic, which can be related to his overweight condition.

Another factor we must consider is Mr. Payton's race. He is African American. The relevance of this fact in the COVID-19 context is addressed below.

**2. Mr. Payton's achievements at the BOP.**

Mr. Payton has made efforts to improve himself while at the BOP. He participated in BOP's nonresidential drug program, he earned a GED, and he participated in parenting classes. Also, he works in food services within the BOP. Finally, Mr. Payton has no disciplinary infractions while incarcerated.



## **V. ARGUMENT**

### **A. Introduction.**

This case involves the district court's denial of Mr. Payton's Motion for Compassionate Release Under 18 U.S.C. § 3582(c)(1)(A), which is a codified portion of the First Step Act. Through his Motion for Compassionate Release, Mr. Payton argued that a combination of his health conditions, his race, and the dangers posed by the COVID-19 pandemic warrant his release from BOP custody.

To establish entitlement to compassionate release under the First Step Act, Mr. Payton must establish two factors. First, he must establish "extraordinary and compelling reasons" that warrant a sentence reduction. 18 U.S.C. § 3582(c)(1)(a)(i). Second, he must satisfy the § 3553(a) factors. 18 U.S.C. § 3582(c)(1)(B).

As analyzed below, Mr. Payton suffers from debilitating health conditions. His health conditions and his race, combined with the dangers posed by the COVID-19 pandemic, represent "extraordinary and compelling reasons" to release him from BOP custody.

### **B. Review on certiorari should be granted in this case.**

Rule 10 of the Supreme Court Rules states, "[r]eview on writ of certiorari is not a matter of right, but of judicial discretion." District courts and federal courts of appeal are inundated with motions for compassionate release based on the

COVID-19 pandemic. Yet to date, this Court has not provided a roadmap to analyze the issue. As indicated by the analysis in the following subsection of this Petition titled “The evolution of compassionate release,” Supreme Court guidance on the issue is needed to fulfill Congress’ intent when it enacted the First Step Act. Granting certiorari in Mr. Payton’s case will give the Court an opportunity to provide such guidance.

### **C. The evolution of compassionate release.**

Under changes made to the compassionate release statute by the First Step Act, courts do not have to wait for a motion from the Director of the BOP to resentence prisoners under 18 U.S.C. § 3582(c)(1)(A)(i), if “extraordinary and compelling reasons” exist. Importantly, the reasons that can justify resentencing need not involve only terminal illness or urgent dependent care for minor children.

The first modern form of the compassionate release statute is codified at 18 U.S.C. § 3582 as part of the Comprehensive Crime Control Act of 1984. Section 3582(c) states that a sentencing court can reduce a sentence whenever “extraordinary and compelling reasons warrant such a reduction.” 18 U.S.C. § 3582(c)(1)(A)(i). In 1984, Congress conditioned the reduction of sentences on the Director of BOP filing an initial motion to the sentencing court. Absent such a motion, sentencing courts had no authority to modify a prisoner’s sentence for compassionate release. *Id.*

Congress never defined what constitutes an “extraordinary and compelling reason” for resentencing under Section 3582(c). But the legislative history to the statute gives an indication of how Congress thought the statute should be employed by the federal courts. The Senate Committee stressed how some individual cases, even after the abolition of federal parole, still may warrant a second look at resentencing:

The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence, and some cases in which the sentencing guidelines for the offense of which the defendant was convicted have been later amended to provide a shorter term of imprisonment.

S. Rep. No. 98-225, at 55-56 (1983) (emphasis added). Congress intended for circumstances listed in § 3582(c) to act as “safety valves for modification of sentences,” *id.* at 121, giving judges an opportunity for a second look for possible sentence reductions when justified by various factors that previously could have been addressed through the abolished parole system. This safety valve statute would “assure the availability of specific review and reduction of a term of imprisonment for ‘extraordinary and compelling reasons’ and [would allow courts] to respond to changes in the guidelines.” *Id.* Noting that this approach would keep “the sentencing power in the judiciary where it belongs,” rather than with a federal

parole board, the statute permitted “later review of sentences in particularly compelling situations.” *Id.* (emphasis added).

Congress initially delegated the responsibility for outlining what could qualify as “extraordinary and compelling reasons” to the U.S. Sentencing Commission (“Commission”). *See* 28 U.S.C. § 994(t) (stating “[t]he Commission ... shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.”). The Commission took considerable time to promulgate its policy in response to Congress’s directive. It finally acted in 2007, almost a generation later, with the very general guidance that “extraordinary and compelling reasons” may include medical conditions, age, family circumstances, and “other reasons.” U.S.S.G. § 1B1.13, app. n.1(A). However, this guidance did little to spur the BOP to file on behalf of prisoners who might have met these general standards.

After a negative Department of Justice Inspector General report found that the BOP rarely invoked its authority under the statute to move for reduced sentences, the Commission felt compelled to act again. *See* U.S. Dep’t of Justice, Office of the Inspector General, *The Federal Bureau of Prisons’ Compassionate Release Program*, I-2023-006 (Apr. 2013). The Commission amended its policy statement on “compassionate release” in November 2016. *See* U.S.S.G. § 1B1.13 Amend. (11/1/2016).

In addition to broadening the eligibility guidelines for sentencing courts, the new policy statement admonished the BOP for its past failures to file motions on behalf of inmates who had met the general criteria identified in U.S.S.G. § 1B1.13. *See* U.S.S.G. § 1B1.13, n.4; *see also United States v. Dimasi*, 220 F. Supp. 3d 173, 175 (D. Mass. 2016) (discussing the history of the BOP, DOJ and Commission’s interplay in developing guidance for “compassionate release” motions). Notably, the Commission concluded that reasons beyond medical illness, age, and family circumstances could qualify as “extraordinary and compelling reasons” for resentencing. *Id.*, n.1(A) (including a category for “Other Reasons,” when there is “an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).”).<sup>2</sup>

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<sup>2</sup> *See United States v. Cantu*, No. 1:05-CR-458-1, 2019 WL 2498923, at \*4 (S.D. Tex. June 17, 2019) (holding that, given the changes to the compassionate release statute by the First Step Act, U.S.S.G. § 1B1.13, application note 1(D) “no longer fits with the statute and thus does not comply with the congressional mandate that the policy statement must provide guidance on the appropriate use of sentence-modification provisions under § 3582.”); *United States v. Fox*, No. 2:14-CR-03-DBH, 2019 WL 3046086, at \*3 (D. Me. July 11, 2019) (“I treat the previous BOP discretion to identify other extraordinary and compelling reasons as assigned now to the courts.”); *United States v. Cantu-Rivera*, No. CR H-89-204, 2019 WL 2578272, at \*2 n.1 (S.D. Tex. June 24, 2019) (“Because the current version of the Guideline policy statement conflicts with the First Step Act, the newly-enacted statutory provisions must be given effect.”); *United States v. Beck*, No. 1:13-CR-186-6, 2019 WL 2716505, at \*6 (M.D.N.C. June 28, 2019) (holding that application note 1(D) is “inconsistent with the First Step Act, which was enacted to further increase the use of compassionate release and which explicitly allows courts to grant such motions even when BoP finds they are not appropriate,” and courts thus may “consider whether a sentence reduction is warranted for extraordinary and compelling reasons other than those specifically identified in the application notes to the old policy statement”); *but see United States v. Lynn*, No. CR 89-0072-WS, 2019 WL 3805349, at \*4 (S.D. Ala. Aug. 13, 2019) (holding that application note 1(D) governs compassionate release reductions of sentence and federal judges have no authority to create their own criteria for what constitutes an “extraordinary and compelling” reason for resentencing).

The Commission's actions, however, did little to change the dearth of filings by the BOP on behalf of inmates who satisfied the Commission's general guidance. During the more than three decades during which the BOP was the exclusive gatekeeper for "compassionate release" motions, very little effort was made to implement Congress's intention to provide a safety valve to correct injustices or allow relief under extraordinary and compelling circumstances.

Finally, this changed with the passage of the First Step Act in 2018. *See* P.L. 115-391, 132 Stat. 5194, at § 603 (Dec. 21, 2018). Section 603 of the First Step Act changed the process by which § 3582(c)(1)(A) compassionate release occurs. Instead of depending upon the BOP Director to determine an extraordinary circumstance and move for release, a court can now resentence "upon motion of the defendant," after the inmate exhausts administrative remedies with the BOP, or after 30 days from the receipt of the inmate's request for compassionate release with the warden of the defendant's facility, whichever comes earlier. 18 U.S.C. § 3582(c)(1)(A). Thus, under the First Step Act, a court may now consider the defendant's own motion to be resentenced, without waiting for it to be made by the BOP.

Courts are now authorized to consider a defendant's motion, even one which the BOP opposes, and order resentencing if a court finds that "extraordinary and compelling reasons" warrant a reduction and such a reduction is consistent with the

Section 3553(a) factors. 18 U.S.C. § 3582(c)(1). Resentencing courts are also advised that any decision to reduce a previously ordered sentence be “consistent with applicable policy statements issued by the Sentencing Commission.” 18 U.S.C. § 3583(c)(2).

**D. The history of the COVID-19 pandemic.**

The COVID-19 outbreak presents a compelling and extraordinary circumstance that warrants compassionate release in Mr. Payton’s case. On March 11, 2020, the World Health Organization (hereinafter “WHO”) officially classified the new strain of coronavirus, COVID-19, as a pandemic.<sup>3</sup> As of October 11, 2021, COVID-19 has infected at least 237,383,711 worldwide, leading to at least 4,842,716.<sup>4</sup> As of October 11, 2021, the WHO also indicates that in the United States, approximately 43,792,254 have been infected, leading to 703,599 deaths.<sup>5</sup> These numbers almost certainly underrepresent the true scope of the crisis.

On March 13, 2020, the White House declared a national emergency, under Section 319 of the Public Health Service Act, 42 U.S.C. § 247(d)).<sup>6</sup> On March 16, 2020, the White House issued guidance recommending that, for the next eight

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<sup>3</sup> “WHO Characterizes COVID-19 as a Pandemic,” World Health Organization (Feb. 19, 2021), available at <https://bit.ly/2W8dwpS>.

<sup>4</sup> <https://www.who.int>.

<sup>5</sup> *Id.*

<sup>6</sup> The White House, Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (March 13, 2020), available at <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>.

weeks, gatherings of ten persons or more be canceled or postponed.<sup>7</sup> These drastic measures followed the issuance of a report by British epidemiologists, concluding from emerging data that 2.2 million Americans could die without drastic intervention to slow the global spread of the deadly disease.<sup>8</sup>

The Centers for Disease Control and Prevention (hereinafter “CDC”) have also issued guidance related to the deadly effects of COVID-19 on certain high-risk patients of the population. The CDC updated their list of people who need to take extra precautions on August 20, 2021.<sup>9</sup> According to the CDC, “Having heart conditions such as heart failure, coronary artery disease, cardiomyopathies, and possibly high blood pressure (hypertension) **can make you more likely** to get severely ill from COVID-19.”<sup>10</sup> Also, being “[o]verweight (defined as a body mass index (BMI) > 25 kg/m<sup>2</sup> but < 30 kg/m<sup>2</sup>), obesity (BMI ≥30 kg/m<sup>2</sup> but < 40 kg/m<sup>2</sup>), or severe obesity (BMI of ≥40 kg/m<sup>2</sup>), **can make you more likely** to get severely ill from COVID-19. The risk of severe COVID-19 illness increases sharply with elevated BMI.”<sup>11</sup>

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<sup>7</sup> Sheri Fink, “White House Takes New Line After Dire Report on Death Toll,” *New York Times* (March 17, 2020), available at <https://www.nytimes.com/2020/03/17/us/coronavirus-fatality-rate-white-house.html?action=click&module=Spotlight&pgtype=Homepage>.

<sup>8</sup> Fink, “White House Takes New Line After Dire Report on Death Toll,” *New York Times*.

<sup>9</sup> <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html#MedicalConditionsAdults>.

<sup>10</sup> *Id.* (bold emphasis in original; italicized and underlined emphasis added).

<sup>11</sup> *Id.* (emphasis in original)



Conditions of confinement at FCI Memphis, the prison where Mr. Payton is housed, create an optimal environment for the transmission of contagious disease.<sup>12</sup> People who work in the facility leave and return daily; and people deliver items daily to the prison. These inmates share restrooms and showers. Public health experts are unanimous in their opinion that incarcerated individuals “are at special risk of infection, given their living situations,” and “may also be less able to participate in proactive measures to keep themselves safe,” and “infection control is challenging in these settings.”<sup>13</sup>

The CDC advises that the coronavirus is “spread mainly from person-to-person . . . [b]etween people who are in close contact with one another . . . [t]hrough respiratory droplets produced when an infected person coughs or sneezes.”<sup>14</sup> The droplets can land in the mouths or noses, or can be inhaled into the lungs, of people who are within about six feet of the infected person.<sup>15</sup> The coronavirus is highly contagious and those who are infected can spread the virus

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<sup>12</sup> Joseph A. Bick, “Infection Control in Jails and Prisons,” *Clinical Infectious Diseases* 45(8): 1047-1055 (2007), available at <https://doi.org/10.1086/521910>.

<sup>13</sup> “Achieving a Fair and Effective COVID-19 Response: An Open Letter to Vice-President Mike Pence, and Other Federal, State, and Local Leaders from Public Health and Legal Experts in the United States” (March 2, 2020), at <https://bit.ly/2W9V6oS>.

<sup>14</sup> CDC, Coronavirus Disease 2019 (COVID-19), How It Spreads, Mar. 4, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/prepare/transmission.html>.

<sup>15</sup> *Id.*

even if they are asymptomatic.<sup>16</sup> Additionally, studies have shown that the coronavirus can survive from three hours to three days on various surfaces.

COVID-19 cases have been confirmed at multiple BOP facilities, and with every day that passes, BOP identifies additional cases at additional institutions.<sup>17</sup> As of October 8, 2021, BOP has identified 325 inmates and 482 staff members that are currently positive with COVID-19.<sup>18</sup> A total of 43,658 inmates have tested positive since the pandemic's outbreak.<sup>19</sup> As of October 8, 2021, 262 inmates have died in BOP custody and six BOP staff members have died because of the COVID-19 pandemic.<sup>20</sup> Asked whether the BOP's figures "could be relied upon as an accurate reflection of the number of inmates and staff that are infected," BOP Public Information Supervisor Sue Allison acknowledged that "reporting of cases while tied to positive cases, does not necessarily account for unconfirmed (non-tested) cases."<sup>21</sup>

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<sup>16</sup> Marco Cascella, *et al.*, Features, Evaluation and Treatment Coronavirus (COVID-19), National Center for Biotechnology Information ("NCBI"), Mar. 20, 2020, [https://www.ncbi.nlm.nih.gov/books/NBK554776/#\\_ncbi\\_dlg\\_citbx\\_NBK554776](https://www.ncbi.nlm.nih.gov/books/NBK554776/#_ncbi_dlg_citbx_NBK554776).

<sup>17</sup> U.S. Bureau of Prisons, COVID-19 Coronavirus (updated daily), <https://www.bop.gov/coronavirus/>.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Walter Pavlo, *Bureau of Prisons Underreporting COVID-19 Outbreaks in Prison*, FORBES (Apr. 1, 2020), available at <https://www.forbes.com/sites/walterpavlo/2020/04/01/bureau-of-prisons-underreporting-outbreaks-in-prison/#268a97f7ba32>.

Because transmission may happen asymptotically, BOP is quarantining inmates even in institutions where there are no positive cases. The CDC now warns that as many as 25 percent of people infected with the virus have no symptoms, would not be tested for the virus, and may be “unwitting spreaders.”<sup>22</sup> Dr. Jeffrey Shaman, an infectious disease expert at Columbia University, explains: “The bottom line is that there are people out there shedding the virus who don’t know that they’re infected.”<sup>23</sup>

To this day, inmates must share communal living spaces, such as cells, recreation rooms, dining halls, libraries, and exercise yards. To make matters worse, hand sanitizer, an effective disinfectant recommended by the CDC to reduce transmission, is deemed forbidden “contraband” in BOP facilities because of its alcohol content.<sup>24</sup>

Recognizing the unique risks that correctional facilities pose to both inmates and employees, members of Congress asked the BOP on March 19, 2020, to allow

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<sup>22</sup> Apoorva Mandavilli, *Infected but Feeling Fine: The Unwitting Coronavirus Spreaders*, N.Y. TIMES (Apr. 1, 2020), available at <https://www.nytimes.com/2020/03/31/health/coronavirus-asymptomatic-transmission.html?action=click&module=Top%20Stories&pgtype=Homepage>.

<sup>23</sup> *Id.*

<sup>24</sup> Keri Blakinger and Beth Schwarzapfel, *How Can Prisons Contain Coronavirus When Purell is Contraband?*, ABA J. (Mar. 13, 2020), available at <https://www.abajournal.com/news/article/when-purell-is-contraband-how-can-prisons-contain-coronavirus>.

for the immediate release of elderly, non-violent inmates.<sup>25</sup> The following week, Attorney General Barr urged the Director of the BOP to prioritize home confinement for such vulnerable individuals.<sup>26</sup> On March 27, 2020, more than 400 former DOJ leaders, attorneys, and federal judges sent an open letter to the President, asking that he take immediate action to reduce the population in correctional facilities to prevent the catastrophic spread of COVID-19, in particular by commuting the sentences of elderly and medically vulnerable inmates who have already served a majority of their sentence.<sup>27</sup> The same day, dozens of leading public health experts made a similar request, asking the President to commute the sentences of all elderly inmates, noting that these individuals are at the highest risk of dying from the disease and pose the smallest risks to public safety.<sup>28</sup>

On March 30, 2020, members of Congress wrote Attorney General Barr again to implore him “to do the right thing” and “immediately move to release

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<sup>25</sup> Letter from Rep. Jerrold Nadler & Rep. Karen Bass to U.S. Attorney General William P. Barr (Mar. 19, 2020), *available at* [https://judiciary.house.gov/uploadedfiles/2020-03-19\\_letter\\_to\\_ag\\_barr\\_re\\_covid19.pdf](https://judiciary.house.gov/uploadedfiles/2020-03-19_letter_to_ag_barr_re_covid19.pdf) (“DOJ and BOP must also do all they can to release as many people as possible who are currently behind bars and at risk of getting sick. Pursuant to 18 U.S.C. 3582(c)(1)(A), the Director of the Bureau of Prisons may move the court to reduce an inmate’s term of imprisonment for “extraordinary and compelling reasons.”).

<sup>26</sup> Memorandum from Attorney General William P. Barr to Director of Bureau of Prisons (Mar. 26, 2020), *available at* <https://www.justice.gov/file/1262731/download>.

<sup>27</sup> Letter from Julie Abbate, *et al.* to President Donald J. Trump (Mar. 27, 2020), *available at* <https://fairandjustprosecution.org/wp-content/uploads/2020/03/Letter-to-Trump-from-DOJ-and-Judges-FINAL.pdf>.

<sup>28</sup> Letter from Sandro Galea, *et al.* to President Donald J. Trump (Mar. 27, 2020), *available at* <https://thejusticecollaborative.com/wp-content/uploads/2020/03/Public-Health-Expert-Letter-to-Trump.pdf>.

medically-compromised, elderly, and pregnant prisoners in the custody of the BOP.”<sup>29</sup> On April 3, 2020, Attorney General Barr issued a memorandum directing the BOP to move vulnerable prisoners into home confinement with due “dispatch.”<sup>30</sup> On April 10, 2020, members of Congress wrote again to Attorney General Barr, noting that “since the last time we wrote to you, there have been at least eight deaths in BOP custody,” all of which involved prisoners with “long-term, pre-existing medical conditions,” and asked why BOP “did not see fit to take action concerning these individuals before it was too late.”<sup>31</sup>

On March 31, 2020, BOP employees filed a complaint with the Occupational Safety and Health Administration, alleging that federal prisoners are “proliferating the spread” of COVID-19 and citing “imminent danger” conditions at BOP facilities nationwide. The union listed 100 of 122 facilities nationwide with alleged safety or health hazards. The complaint alleges that the BOP has:

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<sup>29</sup> Letter from Rep. Jerrold Nadler & Rep. Karen Bass to U.S. Attorney General William P. Barr (Mar. 30, 2020), *available at* [https://judiciary.house.gov/uploadedfiles/3.30.20\\_letter\\_to\\_ag\\_barr\\_re\\_covid19.pdf](https://judiciary.house.gov/uploadedfiles/3.30.20_letter_to_ag_barr_re_covid19.pdf).

<sup>30</sup> Attorney General William P. Barr, Memorandum for Director of Bureau of Prisons (“Barr April 3 Memorandum”), Apr. 3, 2020, *available at* <https://www.politico.com/f/?id=00000171-4255-d6b1-a3f1-c6d51b810000>.

<sup>31</sup> Letter from Rep. Jerrold Nadler & Rep. Karen Bass to U.S. Attorney General William P. Barr (Apr. 10, 2020), *available at* [https://judiciary.house.gov/uploadedfiles/2020-04-10\\_letter\\_to\\_doj\\_on\\_covid-19.pdf](https://judiciary.house.gov/uploadedfiles/2020-04-10_letter_to_doj_on_covid-19.pdf); *see also* Luke Barr, Bureau of Prisons Coronavirus Response Under Fire: ‘Reactive,’ Not ‘Proactive,’ Inmates, Staff Say: BOP Has More COVID-19 Cases Than Three States, ABC NEWS (Apr. 1, 2020, 10:49 AM), <https://abcnews.go.com/Health/bureau-prisons-coronavirus-response-fire-reactive-proactive-inmates/story?id=70063263>.

- Directed staff members to return to work within 48 hours of being near those with coronavirus or show symptoms of having the virus;
- Authorized the movement of inmates with suspected or confirmed coronavirus cases to areas nationwide that did not have any known infections;
- Failed to mitigate the spread of COVID-19 in facilities by using air filters or improving ventilation in other ways;
- Failed to maintain social distancing guidelines for inmates and staff; and
- Although BOP has fit tested staff for masks, it “failed to provide the proper N-95 masks to staff who are transporting and have custodial control over hospitalized inmates testing positive for the virus.”

Jails and prisons are among the most dangerous places to be during an epidemic because they create the ideal environment for transmission of contagious diseases.<sup>32</sup> The declaration of Dr. Jaime Meyer, a Yale Law School Liman Center Affiliate, explains the particular risks of contagious diseases in prison. Inmates are confined in close proximity and the staff leave and return daily. Incarcerated

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<sup>32</sup> Matthew J. Akiyama, *et al.*, Flattening the Curve for Incarcerated populations – COVID-19 in Jails and Prisons, NEW ENGLAND J. MED. (Apr. 2, 2020), <https://www.nejm.org/doi/full/10.1056/NEJMp2005687> (“Therefore, we believe that we need to prepare now, by ‘decarcerating,’ or releasing, as many people as possible . . . . “); Joseph A. Bick, *Infection Control in Jails and Prisons*, 45 CLINICAL INFECTIOUS DISEASES 8, 1047–55 (Oct. 15, 2007), available at <https://doi.org/10.1086/521910>.

individuals “are at special risk of infection, given their living situations,” and “may also be less able to participate in proactive measures to keep themselves safe;” “infection control is challenging in these settings,” according to public health experts.<sup>33</sup> Jails and prisons are sites of disproportionate infectious disease rates.<sup>34</sup> Outbreaks of the flu regularly occur in jails, and during the H1N1 epidemic in 2009, many jails and prisons dealt with high numbers of cases.<sup>35</sup>

In China, officials have confirmed the coronavirus spreading rapidly in Chinese prisons.<sup>36</sup> China is not the exception to the rule, as other countries have severe problems with the prison population. For example, former Secretary of State Mike Pompeo called for Iran to release Americans detained there because of the “deeply troubling” “[r]eports that COVID-19 has spread to Iranian prisons,” noting that “[t]heir detention amid increasingly deteriorating conditions defies

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<sup>33</sup> “Achieving A Fair And Effective COVID-19 Response: An Open Letter to Vice-President Mike Pence, and Other Federal, State, and Local Leaders from Public Health and Legal Experts in the United States,” (Mar. 2, 2020), *available at* [https://law.yale.edu/sites/default/files/area/center/ghjp/documents/final\\_covid-19\\_letter\\_from\\_public\\_health\\_and\\_legal\\_experts.pdf](https://law.yale.edu/sites/default/files/area/center/ghjp/documents/final_covid-19_letter_from_public_health_and_legal_experts.pdf).

<sup>34</sup> Leonard S. Rubenstein, *et al.*, *HIV, Prisoners, and Human Rights*, LANCET (July 14, 2016), [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(16\)30663-8/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(16)30663-8/fulltext).

<sup>35</sup> *Prisons and Jails are Vulnerable to COVID-19 Outbreaks*, THE VERGE (Mar. 7, 2020), <https://www.theverge.com/2020/3/7/21167807/coronavirus-prison-jail-health-outbreak-covid-19-flu-soap>.

<sup>36</sup> Rhea Mahbubani, *Chinese Jails Have Become Hotbeds of Coronavirus As More Than 500 Cases Have Erupted, Prompting the Ouster of Several Officials*, BUS. INSIDER (Feb. 21, 2020, 5:11 PM), <https://www.businessinsider.com/500-coronavirus-cases-reported-in-jails-in-china-2020-2>.

basic human decency.”<sup>37</sup> Courts across Iran have granted 54,000 inmates furlough as part of the measures to contain coronavirus across the country.<sup>38</sup>

It was reported on March 18, 2020, that a guard at Rikers Island in New York City had tested positive for COVID-19.<sup>39</sup> Three days later, at least 38 people at Rikers had tested positive.<sup>40</sup> Despite efforts to release hundreds of detainees to try to stem the tide of infection there,<sup>41</sup> the virus continues to spread rapidly; as of April 10, 2020, 304 inmates and 518 staffers had tested positive, and one inmate had died.<sup>42</sup> An op-ed ran in the *Washington Post* on April 10, 2020 with the title: “I’m a doctor on Rikers Island. My patients shouldn’t have to die in jail: In

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<sup>37</sup> Jennifer Hansler & Kylie Atwood, *Pompeo calls for humanitarian release of wrongfully detained Americans in Iran amid coronavirus outbreak*, CNN (Mar. 10, 2020), <https://www.cnn.com/2020/03/10/politics/mike-pompeo-iran-release-detained-americans-coronavirus/index.html>.

<sup>38</sup> Claudia Lauer and Colleen Long, *US Prisons, Jails On Alert for Spread of Coronavirus*, ASSOCIATED PRESS (Mar. 7, 2020, 8:12 PM), <https://apnews.com/af98b0a38aaabedbc059092db356697>.

<sup>39</sup> *NYC Officials Call for Release of ‘Most at Risk’ on Rikers Island as More Test Positive for Virus*, NBC N.Y., ASSOCIATED PRESS (Mar. 18, 2020), <https://www.nbcnewyork.com/news/local/nyc-officials-call-for-release-of-most-at-risk-on-rikers-prison-as-more-test-positive-for-virus/2333348>.

<sup>40</sup> *38 Positive for Coronavirus at Rikers, NYC Jails*, N.Y. TIMES, ASSOCIATED PRESS (Mar. 21, 2020), <https://www.nytimes.com/aponline/2020/03/21/us/ap-us-virus-outbreak-inmates.html>.

<sup>41</sup> Craig McCarthy, *NYC To Release 300 More Rikers Inmates Admit Coronavirus Pandemic*, N.Y. POST (Mar. 25, 2020 7:25 AM), <https://nypost.com/2020/03/25/nyc-to-release-300-more-rikers-inmates-amid-coronavirus-pandemic/>.

<sup>42</sup> Rebecca Rosenberg, *Second Rikers Island inmate Dead From Coronavirus After Failed Release*, N.Y. POST (Apr. 14, 2020, 11:00 AM), <https://nypost.com/2020/04/14/second-rikers-island-inmate-dead-from-coronavirus/>; Justin Carissimo, *First Rikers Island Inmate Dies After Testing Positive for Coronavirus*, CBS NEWS (Apr. 7, 2020 2:36 PM), <https://www.cbsnews.com/news/coronavirus-michael-tyson-rikers-island-inmate-dies-covid-19/>.



anything called a justice system, a death in such circumstances is a failure.”<sup>43</sup> On April 14, 2020, another Rikers inmate died of COVID-19.<sup>44</sup> On March 23, two inmates in Cook County jail were placed in isolation cells after testing positive for COVID-19. On April 8, after a little over two weeks, the virus had infected 238 inmates and 115 staff members.<sup>45</sup> On April 19, the count has risen to 395 inmates and 225 staff members, and four inmates had died.<sup>46</sup> The large-scale release of detainees reflects the growing recognition that “[i]t’s like an approaching tsunami. Once it hits, it’s too late. . . . We should release as many as it’s safe to release in order to avoid a situation like the one at Rikers.”<sup>47</sup>

“The coronavirus is invading U.S. jails and prisons, prompting inmate releases, reduced bail requirements and other extraordinary measures as officials rush to avert a potentially disastrous spread of the virus among crowded inmate populations.”<sup>48</sup> As a prominent group of Yale School of Medicine “medical

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<sup>43</sup> Rachael Bedard, WASH. POST (Apr. 10, 2020, 9:47 a.m. EDT), [https://www.washingtonpost.com/outlook/doctor-rikers-compassionate-release/2020/04/10/07fc863a-7a93-11ea-9bee-c5bf9d2e3288\\_story.html](https://www.washingtonpost.com/outlook/doctor-rikers-compassionate-release/2020/04/10/07fc863a-7a93-11ea-9bee-c5bf9d2e3288_story.html).

<sup>44</sup> Rosenberg, *supra*.

<sup>45</sup> Timothy Williams & Danielle Ivory, Chicago’s jail Is Top U.S. Hot Spot as Virus Spreads Behind Bars, N.Y. TIMES (Apr. 8, 2020), <https://www.nytimes.com/2020/04/08/us/coronavirus-cook-county-jail-chicago.html>.

<sup>46</sup> *4th Detainee at Cook County Jail Dies after Contracting Coronavirus*, NBC CHICAGO (Apr. 19, 2020, 9:37 PM), <https://www.nbcchicago.com/news/local/4th-detainee-at-cook-county-jail-dies-after-contracting-coronavirus/2258480/>.

<sup>47</sup> *38 Positive for Coronavirus at Rikers*, *supra*.

<sup>48</sup> *Releasing Inmates, Screening Staff: U.S. Jails and Prisons Rush to Limit Virus Risks*, N.Y. TIMES, REUTERS (Mar. 22, 2020), <https://www.nytimes.com/reuters/2020/03/22/us/22reuters-health-coronavirus-usa-inmates.html> (emphasis added).

professionals and experts in infectious disease and/or prison populations” wrote to Connecticut Supreme Court Associate Justice Andrew J. McDonald, the way to safeguard inmates is to reduce jail populations now.<sup>49</sup> “Once a case of COVID-19 [is] identified in a facility, it will likely be too late to prevent a widespread outbreak.”<sup>50</sup> Two doctors who are contracted experts for the Department of Homeland Security’s Office of Civil Rights and Civil Liberties said that COVID-19 presents an “imminent risk to the health and safety” of detainees in ICE detention centers, as well as the general public.<sup>51</sup>

And the risks of COVID-19 are increasing because of the Delta variant of the virus. According to the WHO, the Delta variant is “of concern because we know it has increased transmissibility.”<sup>52</sup> “This has been demonstrated by several countries.”<sup>53</sup> “And we know that where the Delta variant is identified, it really rapidly takes off and spreads between people more efficiently than even the Alpha variant that was first detected around December, January 2021.”<sup>54</sup>

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<sup>49</sup> Letter from Dan Barrett to Justice Andrew McDonald (Mar. 26, 2020), *available at* [https://www.acluct.org/sites/default/files/field\\_documents/2020-03-26\\_letter\\_to\\_committee\\_requesting\\_emergency\\_alteration\\_of\\_rules.pdf](https://www.acluct.org/sites/default/files/field_documents/2020-03-26_letter_to_committee_requesting_emergency_alteration_of_rules.pdf).

<sup>50</sup> *Id.*

<sup>51</sup> Catherine E. Shoichet, *Doctors Warn of ‘Tinderbox Scenario’ if Coronavirus Spreads in ICE Detention*, CNN (Mar. 20, 2020, 8:21 PM ET), <https://www.cnn.com/2020/03/20/health/doctors-ice-detention-coronavirus/index.html>.

<sup>52</sup> <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/media-resources/science-in-5/episode-45---delta-variant>.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

Mr. Payton is powerless to take the preventative self-care measures directed by the CDC for him to remain safe from COVID-19 infection. He cannot self-quarantine or partake in “social distancing” in his prison facility. BOP facilities typically have several community spaces, including a common room, laundry facilities, barbershop, medical areas, dining hall, small library and gym. These high-density areas are precisely the kind of spaces that have caused the alarmingly high-spread rates of COVID-19. Hand sanitizer, an effective disinfectant recommended by the CDC to reduce transmission rates, is contraband in jails and prisons because of its alcohol content.<sup>55</sup> Correctional health experts worry that no matter what precautions are taken by crowded prisons, these facilities may become incubators for the COVID-19 disease.<sup>56</sup> Prisons cannot maintain the level of separation and sanitation necessary to prevent widespread infection.<sup>57</sup> As stated above, BOP is NOT taking adequate steps to contain the virus and protect the inmate population.

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<sup>55</sup> Keri Blakinger and Beth Schwarzapfel, “How Can Prisons Contain Coronavirus When Purell is Contraband?,” *ABA Journal* (March 13, 2020), available at <https://www.abajournal.com/news/article/when-purell-is-contraband-how-can-prisons-contain-coronavirus>.

<sup>56</sup> Michael Kaste, “Prisons and Jails Worry About Becoming Coronavirus ‘Incubators’,” *NPR* (March 13, 2020), available at <https://www.npr.org/2020/03/13/815002735/prisons-and-jails-worry-about-becoming-coronavirus-incubators>.

<sup>57</sup> “Prisons and Jails are Vulnerable to COVID-19 Outbreaks,” *The Verge* (Mar. 7, 2020), available at <https://bit.ly/2TNcNZY>.

**E. Mr. Payton’s health conditions warrant releasing him from prison.**

Based on BOP medical records, Mr. Payton suffers from high blood pressure / hypertension. He takes one Hydrochlorothiazide 25 MG tablet per day for hypertension. CDC research indicates, “[h]aving heart conditions such as heart failure, coronary artery disease, cardiomyopathies, and possibly high blood pressure (hypertension) **can make you more likely** to get severely ill from COVID-19.”<sup>58</sup>

Mr. Payton’s hypertension diagnosis supports a ruling that he should be released from prison”<sup>59</sup> That is true because “[p]eople with high blood pressure or high cholesterol are more likely to suffer from Covid-19 complications because of problems with how the heart pumps blood around the body.”<sup>60</sup> The increased risk of COVID-19 health issues for people with high blood pressure is also recognized by the American Heart Association.<sup>61</sup>

Case law supports a conclusion that Mr. Payton’s hypertension warrants compassionate release. *See, e.g., United States v. Salvagno*, 456 F.Supp.3d 420,

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<sup>58</sup> <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html#MedicalConditionsAdults> (bold emphasis in original; italicized and underlined emphasis added).

<sup>59</sup> *Id.*

<sup>60</sup> <https://www.msn.com/en-za/health/medical/health-conditions-that-put-you-at-risk-of-covid-19/ar-BB111QqT>

<sup>61</sup> <https://newsroom.heart.org/news/what-people-with-high-blood-pressure-need-to-know-about-covid-19> (stating people with high blood pressure “may face an increased risk for severe complications if they get the virus”).

438 (N.D. N.Y. 2020); *see also United States v. Pena*, No. 15-CR-551 (AJN), 2020 WL 2301199, at \*4 (S.D.N.Y. May 8, 2020) (“This Court has repeatedly recognized that COVID-19 presents a heightened risk for individuals with hypertension[.]”); *United States v. Soto*, No. 1:18-CR-10086-IT, 2020 WL 2104787, at \*2 (D. Mass. May 1, 2020) (“Defendant’s medical records show that he suffers from hypertension. This condition increases her risk for serious complications from contracting COVID-19, including death.”); *United States v. Scparta*, No. 18-CR-578 (AJN), 2020 WL 1910481, at \* 9 (S.D.N.Y. Apr. 20, 2020) (finding hypertension to be a comorbidity that increases the risk of death from COVID-19, and “reject[ing] the Government’s contention that Mr. Scparta’s general good health before the pandemic speaks to whether he should now be released.”); *United States v. Sawicz*, No. 08-CR-287 (ARR), 2020 WL 1815851 (E.D.N.Y. Apr. 10, 2020) (granting compassionate release to a defendant convicted of possession of child pornography who suffers from hypertension).

Mr. Payton’s case originates from the Southern District of Mississippi, Northern Division. Judge Carlton Reeves of the Southern District, Northern Division, recently canvassed case law in which hypertension was at issue in the COVID-19 / compassionate release context. Following is an excerpt from Judge Reeves’ opinion:

Other courts have granted compassionate relief for inmates suffering from diabetes and hypertension. *See United States v. Lewis*, No. 16-CR-302, 2020

WL 2081374, at \*1 (S.D.N.Y. Apr. 30, 2020) (finding extraordinary and compelling reasons for release because “[i]t [was] beyond dispute that Mr. Lewis is at high risk from COVID-19, as ... [his] diabetes is one of the most significant comorbidity factors and that is no doubt heightened by Mr. Lewis’s high blood pressure.”); *United States v. Colvin*, 451 F.Supp.3d 237, 241 (D. Conn. 2020) (Defendant with diabetes and high blood pressure demonstrated extraordinary and compelling reasons justifying her immediate release); *U.S. v. Rountree*, 460 F.Supp.3d 224, 325 (NDNY 2020) (“Here, in line with numerous other courts to have considered this issue, the Court finds that Rountree’s diabetes and hypertension, in the face of the COVID-19 pandemic, satisfies either § 1B1.13’s specific “medical condition” provision or its “catchall” provision.”).

Courts have also granted compassionate release for defendants suffering from hypertension alone. “What the scientific community knows with relative certainty is that hypertension is one of the most common ‘comorbidities’ in people who experience severe cases of COVID-19, a fact that has been apparent since the early days of the pandemic; indeed, much research identifies hypertension as the most common comorbidity.” *U.S. v. Salvagno*, 456 F.Supp.3d 420, 438 (NDNY 2020). “For many courts, this strong correlation [between hypertension and poor COVID-19 outcomes] has been sufficient to find that COVID-19 poses a heightened risk to hypertensive inmates, for purposes of compassionate release.” *Id.* at 439-40; *see, e.g., United States v. Lavy*, 17-CR-20033, 2020 WL 3218110, at \*4 (D. Kan. June 15, 2020) (citing scientific studies); *United States v. Burke*, No. 17-CR-3089, 2020 WL 3000330, at \*2 (D. Neb. June 4, 2020) (citing scientific studies); *United States v. Foreman*, No. 19-CR-62, 2020 WL 2315908 at \*3–4 (D. Conn. May 11, 2020) (citing New York city and state data); *United States v. Pena*, No. 15-CR-551, 459 F.Supp.3d 544, — (S.D.N.Y. May 8, 2020) (citing CDC data); *United States v. Pabon*, No. 17-CR-165, 458 F.Supp.3d 296, — (E.D. Pa. May 4, 2020) (citing scientific articles and data from China, New York City, and New York State); *United States v. Soto*, No. 18-CR-10086, 2020 WL 2104787, at \*2 (D. Mass. May 1, 2020) (citing WHO data); *United States v. Scparta*, No. 18-CR-578, — F.Supp.3d —, —, 2020 WL 1910481, at \*9 (S.D.N.Y. Apr. 20, 2020) (citing CDC data).

*United States v. Guston*, No. 312CR116CWRFKB3, 2021 WL 149018 at \*3 (S.D. Miss. Jan. 15, 2021).

In *Guston*, Judge Reeves granted compassionate release. *Guston*, 2021 WL 149018 at \*6. The holdings in *Guston* certainly support ruling that Mr. Payton should be granted compassionate release because he suffers from hypertension.

In addition to hypertension, Mr. Payton is obese, with a BMI of 38.91. The CDC defines obesity as people with a BMI greater than or equal to 30 kg/m<sup>2</sup> and less than 40 kg/m<sup>2</sup>. The CDC states that obesity “**can make you more likely** to get severely ill from COVID-19.”<sup>62</sup>

In *United States v. Walker*, No. CR ELH-18-0017, 2021 WL 461838 (D. Md. Feb. 9, 2021), the court collected cases in which other courts found that an inmate’s obesity warrants compassionate release. The cases cited in *Walker* are: *United States v. Staten*, PJM-01-284-4, 2020 WL 4904270, at \*2 (D. Md. Aug. 18, 2020) (finding an “extraordinary and compelling reason” for compassionate release based on a BMI of 38); *United States v. Williams*, PWG-19-134, 2020 WL 3073320 (D. Md. June 10, 2020) (finding obese defendant with a BMI of 32.5 qualified for compassionate release in light of COVID-19); *United States v. Quintero*, 08-CR-6007L, 2020 WL 2175171, at \*1 (W.D.N.Y. May 6, 2020) (finding defendant's diabetes, compromised immune system, obesity, and hypertension satisfied an extraordinary and compelling reason); *United States v.*

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<sup>62</sup> <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html#MedicalConditionsAdults> (emphasis in original).

*Dawson*, No. 18-40085, 2020 WL 1812270, at \*7 (D. Kan. Apr. 9, 2020) (granting compassionate release based on a defendant's obesity); *United States v. Zukerman*, 451 F. Supp. 3d 329, 336 (S.D.N.Y. 2020) (concluding that defendant's diabetes, hypertension, obesity, and age satisfied extraordinary and compelling reason). *Walker*, 2021 WL 461838, at \*9. These cases support a conclusion that Mr. Payton's obesity supports granting him compassionate release.

Also worthy of consideration is Mr. Payton's recent leg injury. He informed the undersigned that a sprinkler broke on February 16, 2021, causing an excessive amount of water on the floor. He slipped and fell, resulting in a leg injury and infection in his leg. Mr. Payton indicated that he has been to three hospitals for treatment of this injury. The last hospital stay was from February 27 to March 9, 2021. This infection, combined with the dangers posed by COVID-19, is another extraordinary and compelling reason to grant compassionate release.

A final factor that we must consider is Mr. Payton's race. He is African American. According to the CDC, race is a factor that warrants consideration in the COVID-19 analysis. "Long-standing systemic health and social inequities have put various groups of people at increased risk of getting sick and dying from COVID-19, including many racial and ethnic minority groups[.]"<sup>63</sup> Mr. Payton's

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<sup>63</sup> <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html>.



status as a racial minority is another building block supporting compassionate release.

The CDC recommends those in a higher risk category avoid exposure to the virus.<sup>64</sup> There is an urgent need to act now, because COVID-19 has already spread to Memphis FCI and almost all other BOP facilities. As described in the attached declaration of Dr. Jamie Meyer, an infectious disease specialist and Assistant Professor of Medicine at Yale School of Medicine, inmates are uniquely vulnerable:

[t]he risk posed by infectious diseases in jails and prisons is significantly higher than in the community, both in terms of risk of transmission, exposure, and harm to individuals who become infected.

Dr. Meyer describes the inadequate pandemic preparedness plans in many detention facilities and the difficulty of separating infected or symptomatic inmates from others. The risk of disease transmission at Memphis FCI, combined with Mr. Payton's health conditions, presents an extraordinary and compelling reason to grant his compassionate release.

**F. Mr. Payton is not a danger to society.**

Mr. Payton will not be a danger to the community if his sentence is modified or reduced. Although Mr. Payton's charges were serious, he is taking advantage of

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<sup>64</sup> <http://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/asthma.html>.

the programs at Memphis FCI, and has not had any disciplinary write-ups. He has completed several programs, and has “above average work evaluations.”

If given home confinement, Mr. Payton will seek additional medical care for the diagnoses and symptoms that he is dealing with while incarcerated. He will also seek employment with the Animal Rescue League, as he has several years of experience working with veterinary clinics. Plus, he has already arranged to live with relatives upon release. These facts indicate that he will not be a danger to society of this Court grants him compassionate release.

But even if this Court deems Mr. Payton a danger to society, that factor, in and of itself, does not bar compassionate release. The Sixth Circuit analyzed this issue in *United States v. Sherwood*, \_\_ F.3d \_\_, 2021 WL 345405 (6th Cir. 2021).

In addition to the “extraordinary and compelling reasons” factor, the *Sherwood* court held that compassionate release is warranted where a reduction “is ‘consistent with applicable policy statements issued by the Sentencing Commission’ set forth in U.S.S.G. § 1B1.13; and that the § 3553(a) factors, to the extent they apply, support a reduction.” *Sherwood*, 2021 WL 345405 at \*1 (citing 18 U.S.C. § 3582(c)(1)(A)) (emphasis added). At issue in *Sherwood* was “the second step in that three-step statutory formula, § 1B1.13, which, among other things, requires district courts to find that “the defendant is not a danger to the

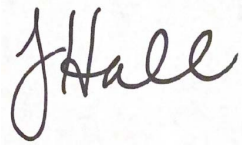
safety of any other person or to the community ...” *Id.* (quoting U.S.S.G. § 1B1.13(2)) (emphasis added).

In the context of § 1B1.13, the court held, “[f]ollowing enactment of the First Step Act, district courts addressing defendant-filed motions for release may now ‘skip step two of the § 3582(c)(1)(A) inquiry,’ meaning they need not consider § 1B1.13 when ruling on those motions.” *Sherwood*, 2021 WL 345405 at \*1 (citations omitted). Therefore, “because satisfying the § 1B1.13 policy statement is no longer a requirement for defendant-filed compassionate release motions, the policy statement’s requirement that the defendant not be a danger to the community no longer provides an independent basis for denying compassionate release.” *Id.* (citation omitted).

## **VI. CONCLUSION**

Based on the arguments presented above, Mr. Payton asks the Court to grant his Petition for Writ of Certiorari in this case.

Submitted October 20, 2021, by:

A handwritten signature in black ink, appearing to read "J. Hall", is positioned above a horizontal line.

**Jacinta A. Hall**

Assistant Federal Public Defender  
Southern District of Mississippi  
200 South Lamar Street, Suite 200-N  
Jackson, Mississippi 39201  
Telephone: 601/948-4284  
Facsimile: 601/948-5510

Attorney for Defendant-Petitioner

NO. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES  
OF AMERICA

ANCE PAYTON  
Petitioner-Defendant

v.

UNITED STATES OF AMERICA  
Respondent

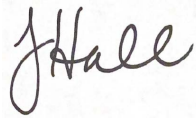
On Petition for Writ of Certiorari from the  
United States Court of Appeals for the Fifth Circuit.  
Fifth Circuit Case No. 21-60187

**CERTIFICATE OF SERVICE**

I, Jacinta A. Hall, appointed under the Criminal Justice Act, certify that today, October 20, 2021, pursuant to Rule 29.5 of the Supreme Court Rules, a copy of the Petition for Writ of Certiorari and the Motion to Proceed In Forma Pauperis was served on Counsel for the United States by Federal Express, No. XXX, addressed to:

The Honorable Brian H. Fletcher  
Solicitor General of the United States  
Room 5614, Department of Justice  
950 Pennsylvania Ave., N.W.  
Washington, D.C. 20530-0001

I further certify that all parties required to be served with this Petition and the Motion have been served.

A handwritten signature in black ink, appearing to read "J. Hall", is positioned above a horizontal line.

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**Jacinta A. Hall**  
Assistant Federal Public Defender