

**IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF MISSOURI  
WESTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERT R. COURTNEY,

Defendant.

No. 01-00253-01-CR-W-ODS

**RESPONSE IN OPPOSITION TO MOTION FOR REDUCTION IN SENTENCE**

Defendant Robert R. Courtney filed a *pro se* motion for reduction of sentence pursuant to 18 U.S.C. § 3582(c)(1)(A)(i) on December 12, 2019. (D.E. 162.) Supplemental suggestions in support of the motion were filed on July 9, 2020. (D.E. 178.) Defendant requests the Court to grant his motion and reduce his sentence to a term of time served. (D.E. 178, p. 17.) Defendant argues that he should be released because (1) his health problems and his age put him at increased risk of severe illness from COVID-19, and (2) his post-sentencing rehabilitation efforts warrant a reduction of his sentence when considered in light of the purposes of sentencing set forth in 18 U.S.C. § 3553(a).

The United States opposes Defendant's request for a reduction in sentence and compassionate release. Consideration of the issues taken into account in evaluating a compassionate release application leads to the conclusion that Defendant's motion should be denied. Of greatest importance in this case, the sentencing factors under 18 U.S.C. § 3553(a) weigh heavily against, rather than in favor of, a sentence reduction.

The Warden at FCI Englewood, Defendant's current place of confinement, denied Defendant's request for a reduction in sentence/compassionate release, stating, "However, your

concern about being potentially exposed to, or possibly contracting COVID-19 does not currently warrant an early release from your sentence.” (D.E. 178-2.) The Warden’s denial referred to the Bureau of Prisons’ extraordinary measures to contain the spread of COVID-19 and treat any affected inmates, as discussed below.

The Federal Bureau of Prisons (BOP) has established procedures for submission and consideration of inmates’ requests for reduction in sentence/compassionate release. (Program Statement 5050.50, Jan. 17, 2019, “Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582 and 4205(g).”) An inmate’s request must contain the following information, *inter alia*: “Proposed release plans, including where the inmate will reside, how the inmate will support himself/herself, and, if the basis of the request involves the inmate’s health, information on where the inmate will receive medical treatment, and how the inmate will pay for such treatment.” (Program Statement, § 571.61(2).)

Defendant avers that he has a “verifiable release plan” (D.E. 178, p. 16), referring to the proposed “Release Plans,” submitted with his request to the Warden at FCI Englewood for a reduction in sentence (D.E. 178-1, p. 16), where Defendant indicated that he would reside in Trimble, Missouri. Recently, the BOP considered placing Defendant on Home Confinement which would not have reduced Defendant’s sentence, but would have merely modified the location where Defendant would continue to serve his sentence. However, the BOP cancelled the Home Confinement designation, as the proposed home release plan was no longer an available option. As a practical matter for consideration of Defendant’s Motion for a Reduction in Sentence, Defendant does not have a viable plan for release from custody at this time. Thus, even if the Court were to consider granting Defendant’s request to reduce his sentence, Defendant cannot meet his burden of providing a viable plan for release.

Based on the information made available on the Bureau of Prisons Inmate Locator, Defendant's release date is May 2, 2027. (See <https://www.bop.gov/inmateloc/>.) He has about seven years remaining to serve of his 30 year sentence. The sentencing factors set forth in 18 U.S.C. § 3553(a), and grounds for upward departure, that were considered when the Court imposed a 30 year sentence should continue to receive prominent consideration in determining whether to grant Defendant's motion for reduction in sentence. Defendant should be required to serve his full 30 year sentence for all the reasons the sentence was originally imposed.

### **Exhaustion of Remedies**

Taking into account the procedural history of Defendant's motion for reduction in sentence, under the circumstances, the Government concedes that further exhaustion of administrative remedies can be excused and the Court can proceed to determine the merits of Defendant's motion for reduction in sentence.

### **Evaluation of an Application for Compassionate Release**

The First Step Act, effective December 21, 2018, provides that an inmate may file a motion for compassionate release. Under 18 U.S.C. § 3582(c) a court may not modify a term of imprisonment once it has been imposed except that, under subsection § 3582(c)(1)(A), a court may reduce a term of imprisonment upon finding "extraordinary and compelling reasons," (1) if such reduction is consistent with applicable policy statements of the Sentencing Commission, (2) after considering the factors set forth in 18 U.S.C. § 3553(a), and (3) after determining the defendant is not a danger to the community as provided in 18 U.S.C. § 3142(g). (U.S.S.G. § 1B1.13(2).) The pertinent policy statement, U.S.S.G. § 1B1.13, defines specific medical, age, and family circumstances as possibly justifying a sentencing reduction under this statute, and further

authorizes a sentencing reduction based on an extraordinary and compelling circumstance identified by the BOP. (U.S.S.G. §1B1.13 Commentary n.1(D).)

In *United States v. Mork*, 2020 WL 3026647 at \*3 (D. Minn. 06/05/2020), the district court set forth the three issues to be considered in evaluating a compassionate release application as found by “numerous district courts,” consistent with the issues enumerated above:

[T]he following three issues must be considered in evaluating a compassionate release application: (1) whether “extraordinary and compelling reasons warrant a sentence reduction consistent with the Sentencing Commission’s policy statement”; (2) whether the sentencing factors under § 3553(a), “to the extent they are applicable,” weigh in favor of a sentence reduction; and (3) whether the “prisoner is a danger to the safety of any other person or to the community.” (Citations omitted.)

#### **The Reasons for Imposition of a 30 Year Sentence**

The sentencing hearing was on December 5, 2002. The Court heard the Government’s arguments for an upward departure from the sentencing range computed under the Sentencing Guidelines and Defendant’s arguments for sentencing within that range, from 210 to 262 months of imprisonment. The Court departed upward to a sentence of 360 months—30 years—for reasons explained on the record. (Excerpt of Transcript of Proceedings, p. 1 and pp. 118-125, attached as Exhibit 1.) The Court entered an Order Specifying Reasons for Upward Departure the same day. (D.E. 131, published at *United States v. Courtney*, 240 F. Supp. 2d 1052 (W.D. Mo. 2002).)

The Court found that application of the Sentencing Guidelines’ method for computing a sentencing range did not adequately insure appropriate additional punishment for the additional crimes Defendant committed. (D.E. 131, p.2.) Another reason for upward departure was that, “Defendant’s conduct posed a unique and substantial risk of psychological injury.” (*Id.*, at p. 3.) On Defendant’s appeal from the sentence, the Eighth Circuit agreed that these two reasons solidly supported the upward departure, and affirmed the sentence. *United States v. Courtney*, 362 F.3d

497 (8th Cir. 2004). The Supreme Court granted Defendant's petition for a writ of certiorari, vacated the judgment of the Court of Appeals, and remanded the case to the Eighth Circuit for further consideration in light of *United States v. Booker*, 543 U.S. 220 (2005). On remand, the Eighth Circuit held that the imposition of an upward departure was unaffected by the *Booker* decision, and reinstated its opinion affirming this Court's sentencing decision. *United States v. Courtney*, 412 F.3d 855 (8th Cir. 2005). Thus, after fully exercising his rights to appeal, Defendant remains under a 30 year sentence.

Along with the reasons for upward departure, the Court considered the factors set forth in 18 U.S.C. § 3553(a), stating: "It is my view and belief that the nature and circumstances of the offense justify this sentence. That the sentence imposed is necessary to reflect the seriousness of the offense, to promote respect for the law and to provide just punishment for the offense. And that it is necessary to afford adequate deterrence to others who might be tempted to engage in the same or similar conduct." (Exh. 1, p. 125.) Obviously, nothing has changed about the nature and seriousness of the offense. The 30 year sentence was, and remains, just punishment.

### **Post-Sentence Rehabilitation**

Defendant argues that his efforts to assist the government and his accomplishments in completing numerous courses and programs while incarcerated should weigh in favor of reduction of his sentence. (D.E. 178-1 and 178-4.) Rehabilitation of a defendant is not, standing alone, an extraordinary and compelling reason for a reduction of a term of imprisonment. (U.S.S.G. §1B1.13 Commentary n.3; 28 U.S.C. §944(t).)

At the time of sentencing, the Court did not make mention of the purpose set forth in 18 U.S.C. § 3553(a)(2)(D), the need for the sentence imposed "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most

effective manner.” Defendant was a pharmacist and could have been successful in his profession without breaking the law. He was not suffering from addiction or any condition that can lead to unlawful behavior. At the time of sentencing, there was no significant concern regarding rehabilitation; the purpose of sentencing in this case was to provide just punishment for inexcusable crimes.

### **BOP Response to the Coronavirus Pandemic**

Defendant argues that his health problems and his age put him at increased risk of serious illness if he should contract COVID-19.

The BOP has taken significant measures to protect the health of all inmates. The BOP began planning for potential coronavirus transmissions in January 2020. At that time, the agency established a working group to develop policies in consultation with subject matter experts in the Centers for Disease Control (CDC), including by reviewing guidance from the World Health Organization (WHO). On March 13, 2020, the BOP announced that it was implementing the Coronavirus (COVID 19) Phase II Action Plan in order to minimize the risk of COVID-19 transmission into and inside its facilities. The Action Plan comprises many preventive and mitigation measures, including the following:

- **Screening of Inmates and Staff:** All new BOP inmates are screened for COVID-19 symptoms and risk of exposure. Asymptomatic inmates with a documented risk of exposure will be quarantined; symptomatic inmates with documented risk of exposure will be isolated and tested pursuant to local health authority protocols. In areas with sustained community transmission, all facility staff will be screened for self-reported risk factors and elevated temperatures. (Staff registering a temperature of 100.4 degrees F or higher will be barred from the facility).
- **Quarantine Logistics:** All BOP institutions establish quarantine areas within their facilities to house any inmates found to be infected with or at heightened risk of being infected with coronavirus pursuant to the above-described screening protocol.
- **Suspension of Social Visits and Tours:** The BOP placed a 30-day hold on all social visits and tours.

- **Suspension of Legal Visits:** The BOP placed a 30-day hold on legal visits, with exceptions permitted on a case-by-case basis.
- **Suspension of Inmate Movements:** The BOP ceased the movement of inmates amongst its facilities for at least 30 days, with exceptions for medical treatment and other exigencies.
- **Modified Operations:** BOP facilities modified operations in order to maximize social distancing.

On March 18, 2020, the BOP implemented Phase III of the Action Plan maximizing telework for locations that perform administrative services. All cleaning, sanitation, and medical supplies were inventoried, and sufficient supplies were on hand and ready to be distributed to facilities as necessary. The BOP placed additional orders for supplies, in case of a protracted event.

See [https://www.bop.gov/resources/news/pdfs/20200324\\_bop\\_press\\_release\\_covid19\\_update.pdf](https://www.bop.gov/resources/news/pdfs/20200324_bop_press_release_covid19_update.pdf) (Phases I-III).

Phase IV of the Action Plan was implemented on March 26, 2020. The BOP revised and updated its quarantine and isolation procedures to require all newly admitted inmates, whether in a sustained community transition area or not, be assessed using a screening tool and temperature check. Asymptomatic inmates are placed in quarantine for a minimum of 14 days or until cleared by medical staff. Symptomatic inmates are placed in isolation until they test negative for COVID-19 or are cleared by medical staff as meeting CDC criteria for release from isolation.

On April 1, 2020, in response to a growing number of quarantine and isolation cases, the BOP implemented Phase V and directed the following actions be taken immediately to further mitigate the exposure and spread of COVID-19:

- For a 14-day period, inmates in every institution be secured in their cells/quarters to decrease the spread of the virus.

- During this time, to the extent practicable, inmates should still have access to programs and services that are offered under normal operating procedures, such as mental health treatment and education.
- The BOP is to coordinate with the United States Marshals Service to significantly decrease incoming movement during this time.
- After 14 days, this decision will be reevaluated.
- Limited group gathering will be afforded to the extent practical to facilitate, commissary, laundry, showers, telephone, and Trust Fund Limited Inmate Computer System (TRULINCS) access.

See [https://www.bop.gov/resources/news/20200331\\_covid19\\_action\\_plan\\_5.jsp](https://www.bop.gov/resources/news/20200331_covid19_action_plan_5.jsp) (phases IV-V).

Phase VI, implemented on April 13, 2020, extended all Phase V measures until May 18, 2020. [https://www.bop.gov/resources/news/pdfs/20200414\\_press\\_release\\_action\\_plan\\_6.pdf](https://www.bop.gov/resources/news/pdfs/20200414_press_release_action_plan_6.pdf). On April 23, 2020, and again on May, 7, 2020, the BOP announced they had substantially expanded their ability to test inmates for COVID-19 by using Abbott ID NOW instruments for Rapid RNA testing. [https://www.bop.gov/resources/news/pdfs/20200423\\_press\\_release\\_covid19\\_testing.pdf](https://www.bop.gov/resources/news/pdfs/20200423_press_release_covid19_testing.pdf); [https://www.bop.gov/resources/news/pdfs/20200507\\_press\\_release\\_expanding\\_rapid\\_testing.pdf](https://www.bop.gov/resources/news/pdfs/20200507_press_release_expanding_rapid_testing.pdf)

Phase VII, announced on May 18, 2020, extended all measures from Phase VI, and will remain in place through June 30, 2020, at which time the plan will be evaluated. [https://www.bop.gov/resources/news/20200520\\_covid-19\\_phase\\_seven.jsp](https://www.bop.gov/resources/news/20200520_covid-19_phase_seven.jsp). Further details regarding the BOP's COVID-19 action plan and efforts are available at [https://www.bop.gov/resources/news/20200313\\_covid-19.jsp](https://www.bop.gov/resources/news/20200313_covid-19.jsp) and at a daily updated resource page: <https://www.bop.gov/coronavirus/index.jsp>.<sup>1</sup> For current information to address

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<sup>1</sup> According to the resource page, due to the rapidly evolving nature of this public health crisis, the BOP will update the dashboard daily at 3:00 p.m. based on the most recently available data from across the agency as reported by the BOP's Office of Occupational Health and Safety.



misreporting and misinformation about the BOP and COVID-19, see [https://www.bop.gov/coronavirus/docs/correcting\\_myths\\_and\\_misinformation\\_bop\\_covid19.pdf](https://www.bop.gov/coronavirus/docs/correcting_myths_and_misinformation_bop_covid19.pdf).

Taken together, these measures are designed to sharply mitigate the risks of COVID-19 transmission in a BOP institution. BOP professionals continue to monitor this situation and adjust practices as necessary to maintain the safety of prison staff and inmates while also fulfilling its mandate of incarcerating all persons sentenced or detained based on judicial orders.

### **Conclusion**

The Government does not minimize the concern or the risk to inmates such as Defendant related to the coronavirus pandemic. Nevertheless, the reasons for imposition of a 30 year sentence override all reasons for considering a substantial reduction of that sentence. The Government requests the Court to deny Defendant's motion for a reduction of his sentence to time served.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was delivered on July 24, 2020, to the CM/ECF system of the United States District Court for the Western District of Missouri for electronic delivery to all counsel of record.

*/s/ Thomas M. Larson*

Thomas M. Larson  
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