

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

JAMES NATHAN FRY,

Defendant.

Case No. 11-cr-00141 (PAM/KMM)

**JAMES FRY'S MEMORANDUM IN
SUPPORT OF RENEWED
EMERGENCY MOTION FOR
COMPASSIONATE RELEASE**

Last week, as the Court is aware, the Court denied James Fry's motion for compassionate release because the Court determined that the risk posed to Mr. Fry by COVID-19—at that point—was too speculative. That risk has now become substantially more concrete for two reasons. First, the Bureau of Prisons ("BOP") has confirmed that COVID-19 has reached FCI Englewood, where Mr. Fry is serving his term of incarceration. And, second, counsel has obtained Mr. Fry's BOP medical records, which show that Mr. Fry's health (including serious heart conditions), combined with his advanced age (66), make him especially vulnerable to severe illness or death from the virus.

Accordingly, Mr. Fry respectfully renews his motion for compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A).¹ Mr. Fry—who has served 76 months in prison

¹ Mr. Fry's renewed motion supplements, and incorporates by reference, his Emergency Motion for Compassionate Release, filed on April 13, 2020, and accompanying papers (including the Background and Sections II and III of the Argument in Mr. Fry's Memorandum in Support of His Emergency Motion for Compassionate Release (ECF

(nearly half of his prison term)²—requests a reduction in his sentence to time served, with a condition of home confinement to cover the unserved portion of his prison term, followed by a three-year term of supervised release.

I. COVID-19 Has Reached FCI Englewood.

The Bureau of Prisons has now confirmed that a staff member at FCI Englewood has tested positive for COVID-19.³ Due to the limited testing of BOP inmates and staff, as well as BOP’s failure to keep an up-to-date and accurate count of positive test results and deaths attributable to the virus, there is good reason to believe that the staff member who tested positive at FCI Englewood is not the only one.

The shortage of testing for COVID-19 in this country means that “the United States remains very much in the dark about who has the coronavirus and who does not.”⁴ The situation is even worse in federal prisons. Testing inside prisons has been “scant except for people who self-report symptoms”—which means that “statistics about the

No. 596)). Mr. Fry’s renewed motion does not address § 3582(c)(1)(A)’s exhaustion requirement because it has been more than 30 days since Mr. Fry made a request to BOP to file a motion recommending him for compassionate release on March 27, 2020, and thus he has satisfied the 30-day requirement. *See* 18 U.S.C. § 3582(c)(1)(A).

² Accounting for good-time credit and Mr. Fry’s participation in the Residential Drug Abuse Program, Mr. Fry has 90 months left to serve on his sentence. *See* Bureau of Prison’s Inmate Locator, <https://bop.gov/inmateloc/> (last visited April 26, 2020).

³ *See* Bureau of Prisons, *COVID-19 Update*, <https://www.bop.gov/coronavirus/> (last visited April 27, 2020).

⁴ Ezekiel J. Emanuel and Paul Romer, *Without More Tests, America Can’t Reopen*, THE ATLANTIC, April 18, 2020, <https://www.theatlantic.com/ideas/archive/2020/04/were-testing-the-wrong-people/610234/> (“The United States remains very much in the dark about who has the coronavirus and who does not. We have a shortage of COVID-19 tests, and we simultaneously have the highest number of confirmed cases in the world.”).

number of infections already in BOP facilities are largely meaningless.” *See United States v. Esparza*, 07-cr-00294, 2020 WL 1696084, at *2 (D. Idaho April 7, 2020); *see also Wilson v. Williams*, 20-cv-00794, 2020 WL 1940882, at *2 (N.D. Ohio April 22, 2020) (“[I]t is unlikely that these figures represent the actual number of cases at the institution, given the paltry number of tests the federal government has made available.”); *United States v. Scparta*, 18-cr-578, 2020 WL 1910481, at *2 (S.D.N.Y. April 19, 2020) (“Testing in BOP facilities is severely limited however, and the real numbers are likely far higher.”).

Moreover, it appears that BOP’s count of positive test results and deaths due to COVID-19 may not be up-to-date or accurate. For example, CBS News has reported that on April 21, 2020, Robin Grubbs, a BOP caseworker at the United States Penitentiary in Atlanta, passed away from COVID-19; and according to CBS News, BOP confirmed the report.⁵ Yet, as of April 27, 2020, BOP’s website shows that there has not been a single death among BOP staff in connection with COVID-19.⁶

Indeed, this case is an example of how BOP’s reported COVID-19 statistics are unreliable. On April 20, 2020, counsel for Mr. Fry alerted the Court and the government that FCI Englewood had informed its inmates that a staff member tested positive for

⁵ Cassidy McDonald, *She was promoted a month before her death. Coworkers say she was never moved into her new role, away from sick inmates*, CBS NEWS, April 20, 2020, <https://www.cbsnews.com/news/coronavirus-death-robin-grubbs-atlanta-federal-penitentiary-workers-criticize-covid-19-response/>.

⁶ Bureau of Prisons, *COVID-19 Update*, <https://www.bop.gov/coronavirus/> (last visited April 27, 2020).

COVID-19.⁷ The government responded by email about an hour later that “BOP maintains official statistics, updated daily, regarding diagnosed cases” and linked to BOP’s website (incorrectly) showing that nobody at FCI Englewood had tested positive for COVID-19.⁸ In its opposition to Mr. Fry’s motion for compassionate release, filed the same day, the government stated that “[a]ccording to the Bureau of Prisons, no inmates or staff at FCI Englewood have been diagnosed with COVID-19,” again referring to BOP’s outdated website. (Govt.’s Mem. 3, April 20, 2020 (ECF No. 602).) But BOP’s website eventually caught up with the facts on the ground, and it now shows that a member of FCI Englewood’s staff has tested positive for COVID-19.⁹

The statistics that BOP provides on the number of infections and deaths attributable to COVID-19 in its institutions should thus be taken with a large grain of salt. Even still, as discussed further below, the fact that there is at least one person at FCI Englewood who is infected with COVID-19 means that the spread of the virus throughout the institution is almost assured—a point that has been repeatedly made by public officials and health professionals in their public communications given the highly contagious nature of the virus and inadequate testing capabilities (among other factors).

⁷ Email from C. Fisher to the Chambers of the Hon. Paul A. Magnuson, April 20, 2020.

⁸ Email from T. Rank to the Chambers of the Hon. Paul A. Magnuson, April 20, 2020.

⁹ Bureau of Prisons, *COVID-19 Update*, <https://www.bop.gov/coronavirus/> (last visited April 27, 2020).

II. Mr. Fry's Medical Records Show That He Is Highly Vulnerable to the Virus.

Mr. Fry's medical records show that he has underlying medical conditions—especially serious heart conditions—that, according to the CDC, put him at a high-risk for severe illness or death from COVID-19.¹⁰

In particular, the medical records confirm that Mr. Fry had open heart surgery in October 2004 to repair one of the valves in his heart. (*See, e.g.*, Fisher Decl. Ex. 1 at 4.)

[REDACTED]

¹⁰ *See* Centers for Disease Control and Prevention, *People Are at Higher Risk for Severe Illness*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html> (last visited April 26, 2020) (listing “serious heart conditions” as an underlying condition that puts a person at a higher risk for severe illness from COVID-19).

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[REDACTED]

[REDACTED]

Mr. Fry's serious health conditions, combined with his advanced age (66), place him at a particularly high risk of severe illness or death if he contracts COVID-19. *See* Centers for Disease Control and Prevention, *People Are at Higher Risk for Severe Illness*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html> (last visited April 26, 2020) (noting that “[o]lder adults, 65 years and older, are at higher risk for severe illness and death from COVID-19” and additionally identifying “serious heart conditions” as an underlying condition that increases a person’s vulnerability to COVID-19).

III. Mr. Fry Cannot Engage in Self-Care in Prison.

As the Court noted in its April 21, 2020 Order, one way for Mr. Fry to show an “extraordinary and compelling reason” justifying his release is a medical condition that “substantially diminishes [his] ability . . . to provide self-care within the environment of a correctional facility.” (Order at 2, April 21, 2020 (ECF No. 604) (alterations in original; quoting U.S.S.G. § 1B1.13, application note 1(A)).) In the context of the COVID-19 pandemic, courts have recognized that, “[i]n this moment, the inability for high risk individuals to fully self-isolate”—and otherwise follow the CDC’s guidelines for preventing the spread of the virus, like practicing painstaking hygiene—“is an inability to provide self-care.” *See Esparza*, 2020 WL 1696084, at *3 (“So long as [the defendant]

remains in custody, his capacity to protect himself from a serious, or even fatal, infection will be compromised.”).¹²

Here, Mr. Fry does not have the ability to practice self-care with respect to COVID-19—*i.e.*, he does not have the ability in prison to adequately protect himself from becoming infected with the virus. His conditions at FCI Englewood have not changed since COVID-19 spread to the institution. Mr. Fry still shares a 12-foot by 15-foot cell with three other inmates; he still does not have access to a face mask or hand sanitizer; he is still unable to clean and disinfect frequently touched services; and FCI Englewood still does not practice social distancing. Mr. Fry simply cannot do what the CDC says he should do to maximize the low odds that he can prevent being infected.¹³

¹² See also, *e.g.*, *United States v. Burrill*, --- F. Supp. 3d ----, 2020 WL 1846788, at *3 (N.D. Ca. April 10, 2020) (“[A]ny incarcerated person with one of these underlying conditions is unlikely to be able ‘to provide self-care within the environment of a correctional facility’ to avoid contracting COVID-19.”); *United States v. Colvin*, 3:19 Cr. 179, 2020 WL 1613943, at *4 (D. Conn. April 2, 2020) (“Defendant is ‘unable to provide self-care within the environment of’ FDC Philadelphia in light of the ongoing and growing COVID-19 pandemic because she is unable to practice effective social distancing and hygiene to minimize her risk of exposure.”); *United States v. Perez*, --- F. Supp. 3d ---, 2020 WL 1546422, at *4 (S.D.N.Y. April 1, 2020) (“Confined to a small cell where social distancing is impossible, Perez cannot provide self-care because he cannot protect himself from the spread of a dangerous and highly contagious virus.”); *United States v. Campagna*, 16-cr-78-01, 2020 WL 1489829, at *3 (S.D.N.Y. March 27, 2020) (“Defendant’s compromised immune system, taken in concert with the COVID-19 public health crisis, constitutes, an extraordinary and compelling reason to modify to Defendant’s sentence on the grounds that he is suffering from a serious medical condition that substantially diminishes his ability to provide self-care within the environment of the RCC.”).

¹³ See, *e.g.*, Centers for Disease Control and Prevention, *People Who Need Extra Precautions – What You Can Do*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/what-you-can-do.html> (last visited April 26, 2020) (recommending that people at higher risk of serious illness from COVID-19, *inter alia*, “[s]tay home if

In its opposition to Mr. Fry’s April 13, 2020 motion for compassionate release, the government argued that BOP is “acting appropriately to respond to the threat posed by COVID-19,” citing to public statements by BOP as evidence that the agency is adequately prepared for the pandemic. (Govt.’s Mem. at 9-10.) But the reality is far different.

Inmates, as well as the BOP’s own staff, report that the agency is failing to respond to COVID-19 in its facilities. *The New York Times* recently “spoke[] with more than three dozen workers and inmates in the federal Bureau of Prisons” who have reported that “federal prisons are ill-prepared for a coronavirus outbreak.”¹⁴ Many prisons “lack basic supplies, like masks, hand sanitizer, and soap.”¹⁵ Jose Rojas, a teacher at the Coleman prison complex in Sumterville, Florida—where there are now three reported cases of COVID-19¹⁶—for example, told *The New York Times* that BOP is still “putting [people] in danger.”¹⁷ (See also Def.’s Mem. at 4-5, April 13, 2020 (ECF No. 596)

possible,” “[w]ash your hands often,” “stay 6 feet away” from others, and “clean and disinfect frequently touched services”); Centers for Disease Control and Prevention, *How to Protect Yourself and Others*, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (last visited April 26, 2020) (“Everyone should wear a cloth face cover when they have to go out in public.”).

¹⁴ See *Prisons Have Been Overwhelmed by the Virus*, THE NEW YORK TIMES, <https://nytimes.com/interactive/2020/us/coronavirus-us-cases.html> (last updated April 26, 2020).

¹⁵ *Id.*

¹⁶ Bureau of Prisons, *COVID-19 Update*, <https://www.bop.gov/coronavirus/> (last visited April 27, 2020).

¹⁷ *Prisons Have Been Overwhelmed by the Virus*, THE NEW YORK TIMES, <https://nytimes.com/interactive/2020/us/coronavirus-us-cases.html> (last updated April 26, 2020).

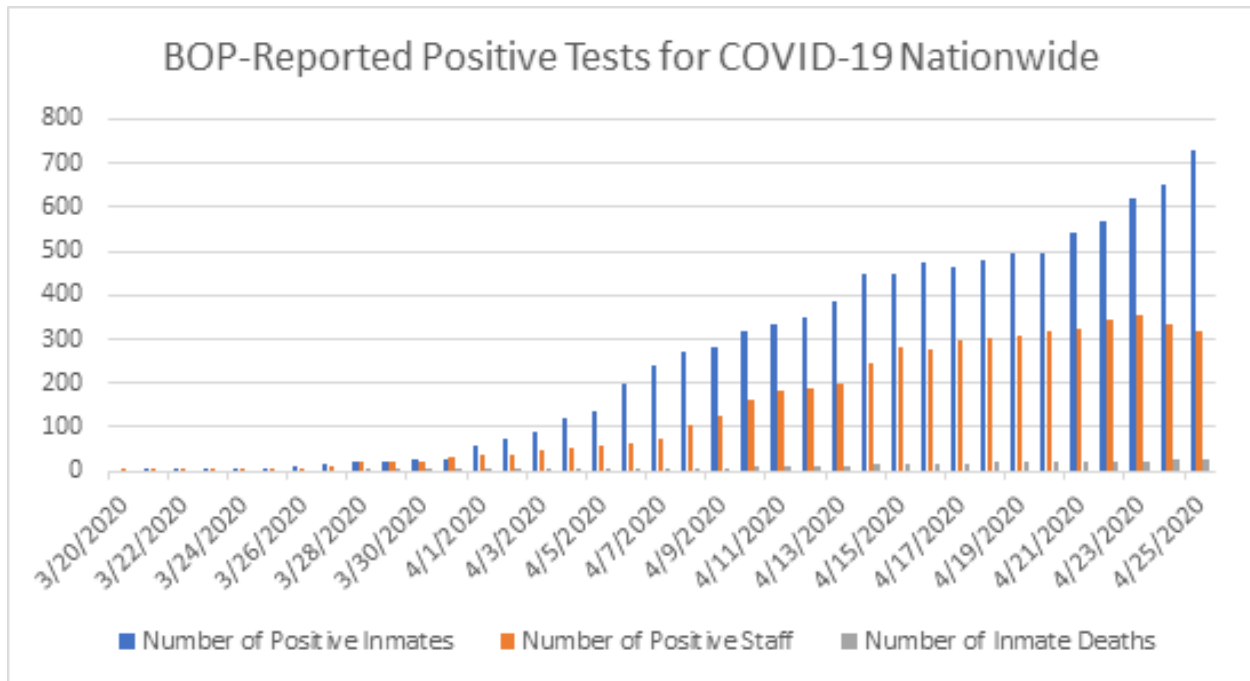
(discussing a number of other reports of BOP's failure to adequately protect inmates and staff from COVID-19, including a wide-ranging OSHA complaint brought by BOP staff).)

Courts have found the same. A court in the Northern District of Ohio recently considered BOP's efforts at FCI Elkton. *See Williams*, 2020 WL 1940882, at *1. The court noted that "officials have implemented measures to lessen the COVID-19 threat," such as "segregat[ing] new inmates for fourteen days," "evaluat[ing] existing inmates with virus symptoms to determine whether isolation or testing is appropriate," "chec[king] inmate and staff temperatures," and "segregate[ting] inmates for fourteen days before allowing" them to leave. *Id.* Nonetheless, "despite [these] efforts," "the prison's 'dorm-style' design guarantees that inmates remain in close proximity to one another"; and "[w]ith the shockingly limited available testing and the inability to distance inmates, COVID-19 is going to continue to spread, not only among the inmate population, but also among the staff." *Id.*¹⁸ In other words, given the inability to engage in social distancing in prison, and the lack of available testing, once COVID-19 enters a prison, there is very little that BOP can do to stop its spread.

As evidence that BOP has not found a way to stem the spread of COVID-19 in its facilities, since Mr. Fry filed his motion for compassionate release on April 13, 2020, the

¹⁸ *See also United States v. Park*, 16-cr-473, 2002 WL 1970603, at *2 (S.D.N.Y. April 24, 2020) ("The nature of prisons – crowded, with shared sleeping spaces and common areas, and often with limited access to medical assistance and hygienic products – put those incarcerated inside a facility with an outbreak at a heightened risk."); *Scparta*, 2020 WL 1910481, at *1 (describing certain of the steps BOP has taken to limit the spread of COVID-19 as "dangerous" and "kafkaesque").

Bureau of Prisons has reported that an additional 787 inmates and staff have tested positive for COVID-19—bringing the total number of BOP inmates and staff that have tested positive to 1,376, more than double the 589 inmates and staff who were reported as positive on April 13, 2020.¹⁹ The below graph shows the increase in reported cases of COVID-19 in BOP institutions since March:



Federal Defenders of New York, <https://federaldefendersny.org/> (last visited April 27, 2020).

There has been no “flattening” in the number of COVID-19 cases within BOP; the curve continues to rise. As this motion is litigated, it will continue to rise.

The government’s argument that BOP has adequately prepared for COVID-19 in its institutions (Govt.’s Mem. at 9-10), and that this Court should defer to BOP’s

¹⁹ Bureau of Prisons, *COVID-19 Update*, <https://www.bop.gov/coronavirus/> (last visited April 27, 2020).

“experience” and “expertise,” does not stand up under even mild scrutiny and is contrary to what is being reported on a daily basis. It beyond serious debate that while he is in prison, Mr. Fry cannot provide the self-care necessary to prevent contracting COVID-19.²⁰

IV. Mr. Fry’s Conviction and Prison History Support Compassionate Release.

In its opposition to Mr. Fry’s April 13 motion for compassionate release, the government claimed that Mr. Fry “created the structure that enabled and incubated one of the largest fraud schemes in U.S. history” and that he “was the architect of the hedge fund structure that permitted the Petters Ponzi scheme to grow from a million dollar fraud to a billion dollar fraud.” (Govt.’s Mem. at 2.) That view of Mr. Fry’s conduct is hard to square with the distance that the government established between Tom Petters’ conduct and Mr. Fry at trial.

For example, in its opening statement, counsel for the government stated: “I want to be 100 percent clear . . . Jim Fry is not on trial for Tom Petters’ fraud.” (Trial Tr., May 20, 2013 (ECF No. 340) at 7.) Midway through the trial, when discussing evidentiary issues outside of the presence of the jury, counsel for the government told the Court that Mr. Fry had “believe[ed] on faith[] that money was coming into Petters account from retailers” though that was “in fact, not true.” (Trial Tr., May 30, 2013 (ECF No. 347) at

²⁰ As noted in Mr. Fry’s April 13, 2020 motion, Mr. Fry is seeking compassionate release now solely due to the threat of COVID-19. If the Court denies this request, Mr. Fry reserves the right to later develop a factual record to support compassionate release based on his health factors more generally, and, absent another emergency comparable to COVID-19, would then go through the BOP process for petitioning for compassionate release for those reasons.

1592.) Finally, in its closing argument, the government reiterated that “Jim Fry is not charged with *participating in or even knowing about* the Petters Ponzi scheme.” (Trial Tr., June 10, 2013 (ECF No. 353) at 2842 (emphasis added).) To be sure, Mr. Fry was convicted of serious criminal conduct. But he was no Tom Petters.

Regardless, it is undisputed that Mr. Fry was convicted for non-violent crimes (securities and wire fraud and false statements), that he has been housed in low security facilities from inception, and that he has not had a single disciplinary violation. Put simply, Mr. Fry’s criminal history and post-conviction conduct is about as good as it could be for someone who is in a federal prison with serious health conditions seeking compassionate release during this unprecedented public-health emergency.

CONCLUSION

For the foregoing reasons, Mr. Fry respectfully requests that the Court grant a reduction in his sentence to time served with an extended period of supervised release to cover the unserved portion of his prison term, with a condition of home confinement through his release date. Mr. Fry also respectfully requests that, if the Court grants his motion, he be released forthwith, to his family who can be at FCI Englewood in a matter of an hour or two, so that he can travel to Florida to serve his term of home confinement.

Dated: April 27, 2020

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