UNITED STATES DISTRICT COURT
Memphis, Tennessee

AUBURN CALLOWAY

v. CASE NO. ___

UNITED STATES OF AMERICA

EMERGENCY MOTION FOR COMPASSIONATE RELEASE

PURSUANT TO

18 U.S.C. 3582(c)(1)(A), 18 U.S.C. 3553(a)

and

CONCEPCION v. UNITED STATES, 597 U.S.___, 142 S.Ct 2389 (2022)

MOTION FOR RECUSAL OF JOHN THOMAS FOWLKES, JR.

MOTION TO TAKE JUDICIAL NOTICE

MOTION FOR DISCOVERY AND EVIDENTIARY HEARING TO SUPPORT MOVANT'S AVERMENTS

Comes now defendant U.S. Navy decorated and honorably discharged veteran Auburn Calloway, PRO SE, and hereby moves this court, pursuant to the First Step Act, 18 U.S.C. 3582(c)(1)(A), 18 U.S.C. 3553(a), CONCEPCION v. UNITED STATES, and the U.S. Constitution, Amendments V and VIII, for sentence modification and immediate release. Defendant also invokes any intervening law and/or facts in support of this pro se motion requesting immediate release under current and/or contemporary statutory and case law as noted below and in the Appendix attached to this motion. Defendant Calloway is an excellent candidate for sentence-modification and immediate release.

I. INTRODUCTION

Seven percent (7%) of the U.S. population are veterans. The late Tomas Young was one. (See Appendix Exhibit 1.) There are nearly 11,000 veterans incarcerated in the Federal Bureau of Prisons (BOP). Defendant Auburn Calloway is one of them. Veterans belong to a demographic group having the highest suicide rate, premature death rate, drug abuse rate, homelessness rate, and divorce rate, compared to almost every other demographic group. Sadly, veterans have the lowest demonstrated gratitude rate for their service to country by fellow Americans, especially those in the U.S. Department of Justice. "American service members have given their lives to uphold our Constitution and to defend the safety and freedoms of our citizens…As a nation, we are grateful to the brave members of our Armed Services -----both [*past*] and present who have forged the legacy for that possibility." -----Joseph R. Biden, Jr., Proclamation 10218 of 5/28/21.

Defendant U.S.Navy veteran Calloway's executive clemency petition has languished without response in the U.S. Pardons Attorney's office for at least 8 years without a response from any of 3 different presidents. The1994-95 U.S. Attorney Veronica Coleman-Davis and her Assistant U.S. Attorney John Thomas Fowlkes, Jr. could have sought the truth underlying Calloway's offense revealed by Dr. William C. Dement, a world renowned Sleep Medicine psychiatrist and forensic pathologist, and Dr. Stanley Fischman, also a psychiatrist (see Appendix Exhibits 2 & 3), but sought a criminal conviction instead, publicly misattributing a fictitious suicide/mass homicide mens rea to the defendant in this case. The *cargo* aircraft involved robbed their prosecution of any terrorism related theme, potentially plausible had a *passenger* airliner been involved instead.

Defendant Auburn Calloway submits this motion to achieve judicial branch correction

of an executive branch systemic injustice pursuant to constitutional checks and balances to advance the policy goals of the congressional branch under relevant intervening laws and facts since the original sentence in this case of a cumulative chain of errors and abuses inflicted both by the FedEx Corporation and its shareholders in the U.S.Attorney's office, to wit, Veronica Coleman-Davis, et al.

Federal law has hitherto made almost no provision for reducing prison sentences, and none at all for mitigating ensuing disabilities. Sentence-modification law has the purpose of correcting the unfairness entrenched in the U.S. mass incarceration agenda. This purpose has been frustrated by legislation aimed at over-incarcerating the poor, the mentally ill, the homeless, and people of color, until now (Wall Street "Banksters" remain "too big to fail" and "to big to jail").

Now, with corrective legislation like the Fair Sentencing Act, First Step Acts, Second Chance Act, CARES Act, etc., buttressed by SCOTUS decisions like **Concepcion v. United States**, and the U.S. Constitution, judges have judicial discretion to use non-retroactive statutory and case law to influence and justify decisions to grant sentence reductions.

Discretionary judicial leniency is of the utmost importance in this motion because, per former Pardons Attorney Margaret Colgate Love in her article **The Twilight of Pardon Power**:

"As the official route to clemency has all but closed, the back-door route has opened wide. In the past two administrations, petitioners with personal or political connections in the White House bypassed the pardon bureaucracy in the Department of Justice, disregarded its regulations, and obtained clemency by means (and sometimes on grounds) not available to the less privileged."

This motion for sentence reduction leniency certainly does *not* bypass any bureaucracy,

nor disregard any regulations, and does not seek a sentence modification by means or on grounds not available to the less privileged.

II. BACKGROUND / OVERVIEW

The facts and acts presented here are not proferred to relitigate stale claims from the 1997 direct appeal nor the habeas collateral attack on the conviction and sentence, but only to describe and provide the court with a basis for the extraordinary and compelling circumstances in this case which, in the court's discretion, can be used to justify an:

Order To Grant Immediate Unconditional Compassionate Release

A. Factual and Procedural History

(1) The Defense, the Courts, and Government Conduct

U.S. Navy veteran Calloway graduated from Stanford University in 1974 with a degree in African and African American Studies. Movant attended Stanford contemporaneously with Charles Ogletree, a friend who eventually became a Harvard Law School professor after being Chief Public Defender in Washington, DC. This case involved an insanity defense, recognized as challenging and uncommon in the criminal justice system due to the complexity of both the applicable law and the evidence that must be presented. Despite requiring experts in the fields of psychiatry and psychology, defense counsel should also have experience in these areas as professor Ogletree did. However, the trial court did not grant a continuance to allow Ogletree's pro hac vice co-representation despite his admission to the court during pre-trial hearings.

Trying an insanity defense to a jury is rare and usually unsuccessful. Federal law governing the defense places on the defendant the onus of satisfying an extremely demanding burden of proof in order to prevail. Always hostile to the defense, juries often

characterize it as an "excuse" used by defendants to avoid the consequences of their actions. The few insanity claims that succeed are almost always the product of an agreement worked out between the defense and the prosecution. Such an agreement occurred in Peter L.Bradley's case after he, a tall "hulking" white man, broke into the cockpit of an Alaska Airlines jet over San Francisco and grabbed the controls trying to crash the plane, announcing his intention to do so. He was never indicted because of an agreement with then-U.S. Attorney Robert Mueller. Both parties hired experts as did the trial judge. Bradley never faced a criminal trial. He was simply released, according to USA Today. A verdict resulting in a 'not guilty by reason of insanity' (NGRI) judgment usually leads to several decades of restrictive institutionalization subject to periodic review of suitability for release. While this did not happen to Bradley, it did happen to John W. Hinckley, Jr., the would-be assassin of President Ronald Reagan, who also severely wounded three others in Reagan's entourage with a gun. Hinckley walks the streets today a free man, like Bradley, on an *UNCONDITIONAL* release granted by a federal judge in 2021. Neither of these two *white* male defendants have shown themselves to be a "danger to the community" despite their crimes being at least as serious as that of U.S. Navy veteran Auburn Calloway.

Defendant Calloway was subjected to extensive unfavorable television, newspaper, and radio publicity. The trial judge had recently been elevated to Chief Judge of the Court which allowed her to remove Calloway's case from a rotating docket that had assigned it to Judge Jerome Turner. This fact was given to Calloway's counsel by Turner himself, a Democratic appointee, as though Judge Turner knew that the outcome would no longer favor Calloway. Predictably, then-U.S. Dist.Court Judge Julia Smith Gibbons

denied most of the crucial defense requests, e.g. a continuance for Ogletree to participate, mistrial, and voir dire of the jurors regarding their exposure to the speculative and spectacular negative publicity.

Fred Smith, founder and CEO of Federal Express, announced to the press in Washington, DC that Calloway was suicidal during the instant offense. FBI Special Agent-in-Charge Joseph Rinehart said in a pretrial news conference in Memphis that Calloway was suicidal based on his agents finding Calloway's Will in his apartment, not based on any psychiatric examination. Defense counsel AC Wharton's efforts to depose Smith were thwarted by FedEx staff attorney R. Larry Brown, thus Smith was never deposed despite a subpoena. Rinehart violated federal CFR's by publicly prejudicing the pretrial jury venue against Calloway. At least 3 documentary films about the incident echo Smith's and Rinehart's suicidality claims to such a great extent that news media representatives and FedEx employees have publicly speculated links between Calloway and Al Qaeda regarding the September 11, 2001 World Trade Center disaster (see **Estabrook v. Admin Review Board 814 Fed. Appx. 870 June 30, 2020 Opinion**).

(2) The Comparative Direct Appeals: John T. Fowlkes, Asst. U.S. Attorney in **U.S. v. Eric Antonio Parker 997 F.2d 219 (6th Cir 1993**), 2 years before Calloway's sentence, had appeals court judges Martin, Boggs, and Contie reverse and remand Parker's conviction for drug possession finding that the government had improperly disclosed evidence of other charges he faced (perhaps with the same effect as the multiplicitous indictment against Calloway). Prosecuting Parker at trial, John Thomas Fowlkes, Jr., then Assistant U.S. Attorney (AUSA), now a judge in this court, improperly introduced a photo of a baby playing with money into evidence. Fowlkes also

improperly prosecuted Parker for his involvement in a conspiracy that continued after he was in custody, improperly using tapes of his conversations against him despite Parker making those conversations *IN COOPERATION WITH THE GOVERNMENT!* Judge Danny Boggs stated that " 'inadvertent' prejudicial remarks by a law enforcement officer revealing bad information about a defendant may warrant reversal." In **U.S. v. Calloway 116 F.3d 1129 (6th Cir 1997),** *both* pretrial prejudicial remarks to the public *and* innuendoes in Fowlkes' closing arguments about suicidality crashing of the plane or causing the plane to crash (Calloway never hoped nor tried to do either), not only encouraged the jury to convict but also influenced the appeals panel to affirm: "It makes no difference whether Mr. Calloway hoped to crash the plane himself or let it crash with no one at the controls" 116 F. 3d at 1134. Neither Calloway's appellate counsel nor the panel asked him what he "hoped" or was thinking and sadly, none of what the trial experts knew ever made it into the appeal. Counsel Robert C. Brooks never interviewed them choosing to relegate the NGRI phase of the bifurcated trial to Calloway's collateral attack litigation.

John Thomas Fowlkes, Jr.'s prosecution, like that of Parker's, prevented the legal system from making an accurate assessment of Calloway's guilt and presents extraordinary and compelling circumstances favoring a sentence modification. His request at sentencing for LWOP for a first time offender, military veteran or not, should be viewed as a sufficiently extraordinary and compelling reason to grant a sentence reduction under current law.

Circuit judges Ryan, Nelson, and Lively, rather than Martin, Boggs, and Contie of Parker's case, vacated Fowlkes' conviction of Calloway for Interference with Flight Crew

Members because "the government concedes" and "on the strength of that concession." This did not cure the harm of influencing Calloway's jury with an intentionally over charging indictment widely known and used by prosecutors to enhance the chance of a conviction, but now provides this court with yet another compelling reason to grant a sentence reduction to the 29 years time-served.

Calloway's aberrant state of mind during the offense is revealed in the dicta of the appellate opinion: "Calloway presented himself at the plane in full flight gear. Although he was not a member of the flight crew, he entered the cockpit and began adjusting instruments and controls as if he were." Counsel failed to mention to the panel at oral arguments that Calloway also had approximately $700 dollars in cash, a full wallet, various cartons of nails, 4 (FOUR) hammers, and an *un*charged (NOT CHARGED!) pneumatic speargun incapable of being fired. (At trial, Fowlkes misrepresented the speargun to the jury as being able to fire). No mention was made of the NGRI defense by counsel, who was later censured by this court for asking court-appointed clients for fees. The cassette tapes of the oral arguments, provided by then-Clerk of the Court Leonard Green, revealed that counsel was 'laughed out of the courtroom' by the panel for his inane argument as to what Calloway may have been contemplating. Could this be another extraordinary and compelling circumstance considered as a reason for sentence modification?

Most relevant to this sentence modification motion is Judge Nelson's dicta "At sentencing… the district court departed from a sentencing guideline offense level of 38 and used a level of 43 instead. The guideline range for offense level 38, absent any significant prior criminal history (and Mr. Calloway had none), is imprisonment for 235-

293 months." "The guideline range for offense level 43, irrespective of criminal history, is life imprisonment." Those guidelines are no longer mandatory therefore this new intervening fact and law leaves full discretion now for granting this sentence modification motion.

The U.S. Supreme Court (SCOTUS) has now held "the First Step Act allows district courts to consider intervening changes of law or fact in exercising their discretion to reduce a sentence pursuant to the First Step Act." **Concepcion v. U.S. 142 S.Ct 2389 (2022)**. "The Court today concludes that district courts in First Step Act sentence-modification proceedings may reduce based not only on the changes to the crack-cocaine sentencing ranges, but also on other unrelated legal or factual changes that have occurred since the original sentencing."--Kavanaugh-dissenting.

(3.) Dangerous and Deliberately Indifferent Conditions of Confinement in a COVID-19 Pandemic: Defendant Calloway has been subjected to an 18 months-long delay in receiving surgery for an inguinal hernia contracted in May 2021 at USP Florence resulting from BOP staff spraying excessive amounts of mace in a housing unit to quash a riot between white inmates. He was asphyxiated when the spraying occurred in front of his cell causing him to have lung spasms and a throat contraction so severe that it became nearly impossible to breathe. The coughing resulted in a hernia in his groin.

Calloway was not taken to a Colorado surgery scheduled [one year] later in May 2022 due to a staff initiated transfer in April 2022 from his medical level 2 prison in Colorado to a level 1 prison in Kentucky where less medical care would be afforded to him! Physician Assistant Billiter at the lesser care facility in Kentucky told Calloway there was

no medical doctor there and that BOP policy required all inmates 70 years of age or older to be at a medical care level 2 or 3.

"Big Sandy" is where Calloway had to stay, by mistake or design, for 5 weeks, 4 of which were in lockdown isolation without recreation. Suffering from spinal stenosis and consequential sciatica nerve damage, Calloway was forced to walk from one end of the complex to the far end while hand-cuffed in the back trying to use his cane. Then he was forced to climb 8 flights of stairs pleading with his staff escort to cuff him in the front which the escort denied. Despite Big Sandy's ability to send Calloway out for surgery, it was not done there, nor at the BOP Atlanta holdover prison, nor at the transfer prison in Oklahoma City. Calloway's administrative remedy requests for surgery were finally granted on Monday 7 November 2022 at the Evangelical Hospital in Lewisburg, PA by general surgeon Dr Motto, who acknowledged that 18 months was far too long a delay.

On June 23, 2021, Calloway reported the extraordinarily and unconstitutionally harsh and painful detention inflicted upon him during a 19-day quarantine in the USP Florence Segregated Housing Unit (SHU). The detention lasted a week longer than it was supposed to last but his report to the warden was ignored (Appendix Ex. 4). That "After-Action Report" is downloadable online at: **www.globalkillingmachine.net.**

Suffering from Non-Celiac Gluten Intolerance, USP Florence medical staff also terminated a "Gluten-free Diet" restriction carried over from USP Lompoc's revised medical status. Without scheduling a gastroenterologist consultation, Florence's Assistant Health Services Administrator told Calloway in front of eye-witnesses "Take some Tums".

On January 6, 2021, Dr Goodman, ophthalmologist at the Kendall Shepard Eye Clinic, Lompoc, California, told movant a "dramatic deterioration" in his eyes from glaucoma

had occurred which would *NOT* have occurred had he been seen earlier with regular appointments. BOP staff had not taken movant to such appointments since 2018!!

On Friday 12 July 2019, an unnecessary and draconian SHU detention unrelated to any disciplinary infraction was imposed on Calloway for 3 days at BOP Lompoc's prison (LOM). Movant was scheduled for a colonoscopy on Monday 15 July which was used as an excuse by two rogue lieutenants to lock him up prematurely. A colonoscopy only requires an overnight SHU detention as in the case of inmate Dave Philips and other white inmates (movant is black). Movant was deprived of food for the entire 3-day detention in a solitary confinement cell in which a plumbing defect only allowed water to trickle from the faucet. During that 3 days detention, movant was also deprived of *all* prescription medicines and never even received the laxative preparation the night before the colonoscopy. Upon arrival at the Lompoc clinic, the doctor refused to perform the colonoscopy without the preparation.

On August 5, 2020, movant mailed a typed "Inmate Request to Staff" to the BOP Western Regional Medical Director regarding the aborted colonoscopy. Inmates are entitled to send such requests "to any staff member" using "Special Mail" procedures when the staff member is a Regional Director. The Regional Director retaliated against movant with two incident reports for writing to him to seek his help. (See Appendix Ex. 5).

Calloway was a class member of a class action titled **Torres, et al. v. Milusnic, et al**. **472 F.Supp.3d 713 (July 14, 2020).** Dr Homer Venters was tasked by the court to investigate the BOP's failure to provide appropriate and adequate medical care for the class at LOM over age 50 with infirmities making them vulnerable to COVID-19.

Venters' shocking court report of the BOP's failures to give appropriate adequate medical care to inmates, buttressed by an earlier DOJ I.G. report, are the extraordinary and compelling circumstances justifying sentence modification under current law especially when viewed in the context of movant's subsequent experiences at other BOP prisons after LOM transferred him away.

III. LEGAL STANDARD

U.S. Navy honorably discharged decorated veteran Auburn Calloway files this motion pro se under **HAINES v. KERNER, 404 U.S. 519 (1972)** and **DENTON v. HERNANDEZ, 504 U.S. 25 (1992)** (mandating that courts read pro se motions indulgently and accept allegations as true unless they are clearly irrational or wholly incredible), pursuant to 18 U.S.C. 3582(c)(1)(A), 18 U.S.C. 3553(a), and **CONCEPCION v. U.S., 142 S.Ct. 2389 (2022).** Necessarily invoked is the U.S. Constitution's Fifth, Sixth, and Eighth Amendments, as they apply to extraordinary and compelling circumstances presented here.

Calloway moves the court to conduct a hearing and discovery on any factual averments the government challenges or the court doubts. Should such discovery or hearing be ordered, the court is moved to appoint appropriate experts *OR* Special Master. Should the government oppose this motion, Calloway moves the court to appoint competent CJA panel assistance of counsel but *NOT* the Memphis Federal Public Defenders Office (FDO) with whom movant has already dealt for more than a year with no competent action from that agency.

A. Eligibility for Reduction in Sentence and Release

1) Movant is eligible for relief based on a preponderance of the evidence and intervening law and facts. Movant is *not* a career criminal; has *no* prior criminal convictions; has no detainers for any offenses committed in any state; has *no* criminal mind; and most importantly, had no criminal mens rea (intent) during the instant offense in which the "Attempt" element was debated as to whether it was "general" or "specific". See **U.S. v. Calloway 116 F.3d 1129, 1136 (1997) ("**We find it difficult to see why the specific intent *requirement* should not apply to attempted aircraft piracy...If we had to decide the issue...we should be inclined to hold that the offense of attempted aircraft piracy requires proof of a specific intent to complete the acts constituting aircraft piracy."

2) Movant has been incarcerated as a first-time offender on *only ONE* charge for which he was sentenced to life without parole (LWOP) despite no deaths in the underlying case nor any *life-threatening* injuries. "The crew of flight 705 sustained *serious* injuries." supra at 1131.

3) The compassionate release statute allows courts to modify a defendant's sentence if:

a) fully exhausts all administrative remedies;
b) he shows that extraordinary and compelling circumstances warrant a modification or release

c) the factors in 18 USC 3553(a) support the reduction or release to the extent they are applicable.

See 18 USC 3582(c)(1)(A)(i). See also **U.S. v. Elias 984 F.3d 516, 518 (6th Cir 2021)** stating that judges may skip consideration of Sentencing Commission policy statements and have full discretion to define "extraordinary and compelling" when prisoners file pro se motions for compassionate release.

Movant attempted exhaustion of administrative remedies in good faith at least 3 times. Movant first filed for compassionate release in 2016 at the BOP's FCI #1 in Adelanto,

California with Public Health Service LCdr Harris. She told movant that he qualified for release due to his sister's terminal cancer, movant's age, and his time spent incarcerated. Harris later updated the application saying the Maryland parole office was investigating his potential residence with his sister but Warden Cynthia L. Swain never responded except to tell Calloway and his attorney, Frank W. Holman, that she did not intend to respond after she transferred him to another prison. Calloway had sent out a press release addressing the high suicide rate of prison staff at FCC Victorville. Special Investigative Service officer Muro showed movant the press release and explained it as the reason for his transfer.

Movant's second administrative request was submitted at LOM in 2018 under Warden Steve Langford via his legal assistant Morales on the same basis as the earlier submission to LCdr Harris, 2 years earlier. Langford retired soon thereafter and Ms Morales transferred, leaving movant, yet again, with no response.

Then, COVID-19 descended upon LOM's staff and inmates as though the Biblical 'Last Days' had arrived. Hundreds of inmates became severely ill and bed-ridden. Dozens were hospitalized. At least 4 inmates died of the infection. Movant's sister also died of a stroke with cancer and COVID complications, but he reapplied for First Step Act (FSA) Compassionate Release due to the pandemic. This 3rd request, submitted to Executive Assistant Suzanne Scott, was also ignored even though movant had become a class member of the **Torres v. Milusnic** lawsuit ("The court found that petitioners had demonstrated a likelihood of success on their Eighth Amendment claims based on Respondents' failure to make meaningful use of the home confinement authority as expanded by the CARES ACT [or] compassionate release which takes into account

Lompoc inmates' risk for severe illness or death from COVID-19." **472 F.Supp.3d 713)**. Thus movant long ago satisfied exhaustion requirements. Alternatively, it is excusable. See **McCarthy v. Madigan 503 US 140 (1992) (**Exhaustion of administrative remedies is not required where it would be futile).

B. Extraordinary and Compelling Circumstances and Reasons:

Webster's New International Dictionary (p. 807) defines *"EXTRAORDINARY"* as "more than ordinary...going beyond what is usual, regular, common, or customary; having little or no precedent (an ~ combination of circumstances); having the nature of an occurrence or risk of a kind other than what ordinary experience or prudence would foresee*."* *COMPELLING* is defined as "demanding and holding one's attention; calling for examination, scrutiny, consideration, or thought (~ evidence)(~circumstances)."

District courts are no longer limited by considerations listed in 1B1.13's policy statement when determining if a defendant's compassionate release request is extraordinary and compelling. **U.S. v. Jones 980 F.3d 1098 (6th Cir 2020)** states that an inmate may have an extraordinary and compelling reason for release where he suffers from *a* medical condition identified as a risk factor for COVID-19. See **Jones** at 1102.

Movant Calloway documents and demonstrates extraordinary and compelling reasons both medical and non-medical. His age and infirmities, all comorbid conditions from which he is not expected to recover, place him at a higher risk to develop a severe illness from COVID-19 itself or exacerbated by it. The mismanagement of his care by BOP staff puts him at even more risk. Although he has been vaccinated with two Pfizer shots and boosted, vaccines and booster protection attenuate while COVID and its variants

elevate in virulence. Even if movant never dies from COVID alone, he can die from other infirmities (FLU, RSV, etc.) comorbid with it.

Any government opposition (imagine that!) to decorated honorably discharged veteran Calloway's immediate release based on his having been a) tested negative for COVID and b) vaccinated, run counter to the common sense that his increasing age, now at 71, and current costly infirmities (to taxpayers) put him at increased risk of severe illness or death from COVID alone or in comorbidity with other geriatric infirmities. Calloway thus moves this court to quash any such opposition motion as being filed in *BAD FAITH* given the "extraordinary and compelling" circumstances of this case.

Such opposition would also run afoul of judicial justifications for granting release in cases where defendants a) have already contracted COVID and *SURVIVED* and b) had shocking criminal histories with sentences for multiple criminal charges. See **U.S. v. Sweet 2021 U.S. Dist. LEXIS 69177** (a 73 year-old granted release upon a showing only of age, medical condition, and pandemic but pleading guilty to "several charges" including homicide-murder *AND* criminal sexual exploitation of children).

The following circumstances put movant at increased risk of severe illness or death from COVID:

(1) *AGE* - Calloway is 71 years old on December 13, 2022.

The CDC advises that "people aged 65 and older may be at higher risk from COVID-19 (People Who Are at Higher Risk for Severe Illness, Centers for Disease Control and Prevention, March 31, 2020, www.cdc.gov/coronavirus/2019-ncov/need-extraprecautions/people-at-higher-risk.html). The CDC has revised its guidance and now concludes "the risk for severe illness with COVID-19 increases with age, with older adults at highest risk." Id. By any measure, movant's age qualifies. Multiple courts in

this circuit agree that defendants of Calloway's age are at increased risk. See **U.S. v. Moore 2020 U.S. Dist. LEXIS 205073.**

(2) *CHRONIC COMORBID MEDICAL INFIRMITIES* (See Appendix Exhibit 6)

Movant's medical records indicate that he suffers from the following infirmities, some of which create an increased risk of severe illness or death from COVID-19:

a) significant chronic cardiopathy with prescription for nitroglycerin tablets;

b) Hypertension with prescriptions for Losartan potassium *an*d hydrochlorothiazide;

c) Hypothyroidism with prescription for Levothyroxine sodium; d) High LDL ("bad") cholesterol with prescription for Atorvastatin; e) Benign Prostate Hypertrophy (BPH) with prescription for Tamsulosin HCL; f) Severe arthritis with prescription for Naproxen; g) Osteoporosis (untreated); h) Lumbar spinal stenosis with severe sciatica nerve damage: treatment with 3 epidural injections circa 2004 without follow-up treatment or medication since that time; i) Glaucoma with partial blindness due to late inadequate BOP medical examinations aggravated by untimely visits with contract ophthalmologists as well as rogue custody staff confiscations of medications and delayed renewals by medical staffs (movant is blessed that he hasn't gone completely blind!); j) Nuclear cataracts in both eyes with the left worse than the right eye due to a "floater" and astigmatism most likely caused by an assault to that eye by Memphis mobster Danny Owens in 1994 in BOP's FCI Memphis pretrial holdover unit. Owens' son Blake stood next to him as back up while Calloway went to the unit officer for help only to be detained in SHU solitary confinement**. NOTE:** When Calloway asked then-Counselor Chambers for Administrative Remedy forms, Chambers' said "We don't have any." Calloway *NEVER* received the forms which initiated his experience with BOP

handling of the Administrative Remedy rights of its inmates. k) Painful inguinal hernia inflicted in May 2021 when movant suffered life-threatening asphyxiation from excessive mace sprayed by BOP officers Figueroa and Clark in his housing unit at USP Florence to quell a riot between white inmates. Movant finally received reparative surgery Monday 7 November 2022, 18 months later! l) Chronic severe obstructive hemorrhoids requiring surgical removal circa 2008; m) tinnitus in both ears severe enough to cause significant hearing loss; n) Rhinitis causing constant nasal drainage and blocking of olfactory nerves: prescription for Flonase was inexplicably eliminated by BOP which imposed on movant the burden of purchasing an inferior nonprescription OTC substitute from prison commissaries; (o) UNDOCUMENTED INFIRMITIES: (i) moderate dementia with progressive memory loss; (ii) impotence due to nearly 29 years of federally enforced sexual deprivation imposed under anti-conjugal incarceration **----NOTE**: This infirmity may well be the aim of draconian sentences for over-incarcerated nonwhite males by the U.S. federal government; (iii) Vitiligo most likely due to vital nutrient deficiencies in federal prison meals especially during lockdowns when stale bread, artificial cheese, peanut butter or baloney, and cookies are served.

No good faith opposition argument exists that movant's many medical infirmities do *NOT* put him at unacceptably high risk of COVID infection, especially in view of the well documented negligence and deliberate indifference by BOP custody *and* medical staffs. Corroboration of their toxic mismanagement of inmates is well documented in the court ordered report of Dr Homer Venters, the DOJ Inspector General report, and the even more extraordinary and compelling U.S. Senate Judiciary Committee hearing on April15, 2021 titled "Oversight of the Federal Bureau of Prisons", but especially the

follow-up letter written by Federal Public Defender David Patton on May 4, 2021 addressed to Senators Dick Durbin and Charles Grassley. (See Appendix Exhibit 7).

After being interviewed at the hearing, Patton pointed out to the Senators highly relevant facts for this motion, to wit: "The average federal prison sentence is 3.8 years." Appendix Ex 7 p.13 citing the USSC 2019 Annual Report and Sourcebook of Federal Sentencing Statistics 64, tbl.15 (2020). This conjures concern as to why Calloway was given the most draconian sentence possible short of the death penalty, without any appellate judge questioning the substantive reasonableness of his sentence sua sponte. An "Appellate court may apply a rebuttable presumption of reasonableness to a sentence within the guideline range." **See U.S. v Angulo 2021 U.S. App. LEXIS 17961 6/15/21**

In the concurring opinion of an unpublished case, Circuit Judge Bright said "The sentence of more than 172 years, 165 years of which are mandatory, may be legal but the sentence is unjust. What occurred in this case is a draconian sentence resulting from mandatory minimum punishments imposed by Congress combined with the power of the prosecutor to manipulate the penalty by adding or subtracting charges in the indictment. In this case, the prosecutor added when he might have subtracted." Fortunately, the FSA and the SCOTUS via its **CONCEPCION** holding, empowers this court to reconsider movant's life-sentence. See **Patton** p. 6, Appendix Ex 7 citing **U.S. v. Redd 444 F.Supp.3d 717, 725 (E.D. Va 2020)** (The FSA was passed against the backdrop of documented infrequency with which the BOP filed motions for a sentence reduction on behalf of defendants."). See also "The bill expands compassionate release ...and expedites compassionate release applications." Statement of Senator Cardin, co-sponsor of the First Step Act. Thus, the intent of Congress is unambiguous.

(3.) THE COVID-19 VACCINE:

Recent data reveals that the threat of severe illness or death from COVID-19, while diminished by vaccination, is nonetheless real. One district court's findings are as follows: The World Health Organization (WHO) issued a scientific brief saying that the public belief that a one-time infection leads to immunity remains unproven and is unreliable as a basis for response to the pandemic. See WHO "Immunity Passports" in the Context of COVID-19, (www.who.int/newsroom/commentaries/ detail/immunity-passports-in-the-context-of-COVID-19.) Specifically, the WHO says that "there is currently no evidence that people who have recovered from COVID-19 and have antibodies are protected from a second infection." If infected inmates who have already been sickened and have developed antibodies *AND* have been vaccinated are still *NOT* immune but run the risk of re-infection if not granted release, how much more at risk is Calloway who has consistently tested negative thus has no antibodies, no immunity, with a weak vaccine requiring a booster which diminishes over time, especially in view of new variant strains that continue to arise??

Defendant Calloway moves the court to take judicial notice that of 246 fully vaccinated Michigan residents who contracted COVID-19 between January and March 2021, three died. See (www.freep.com/story/news/local/michigan/2021/04/06/vaccinated-covid-19-contract-virus-coronavirus/7101678002/.) U.S. District Judge Victoria Roberts granted compassionate release to Roger Sweet stating "The likelihood of reinfection for Sweet may be even higher than for someone not incarcerated because of the congregate prison setting. The frequent large-scale movements of inmates around prison facilities create ideal conditions for the disease's spread." See **U.S. v. Sweet 2021 U.S. Dist. LEXIS**

69177. BOP Director Michael Carvajal said it best:"prisons are not designed for social distancing. In fact, they are designed for just the opposite." See **Patton** p.4 footnote 21, Id.

BOP staff no longer wear masks nor maintain social distancing even when wardens order "Condition Yellow" as though the pandemic ended with the advent of vaccines. There are still COVID infections at movant's present location where inmates pose an even greater danger by not obeying masking mandates nor maintaining social distancing despite a recent outbreak here. See **U.S. v. Park 456 F.Supp.3d 557, 560 (S.D.N.Y. 2020)** ("The nature of prisons - crowded, with shared sleeping spaces and common areas, and often limited access to medical assistance and hygienic products, put those incarcerated inside a facility with an outbreak at heightened risk.").

C. The 18 U.S.C. 3553(a) Sentencing Factors Favor Release

In the FSA setting, a district court is required to conduct a complete review of this sentencing motion on the merits and must consider 18 USC 3553(a) factors. It must also explain its resentencing decision to allow for meaningful appellate review should that become necessary.

The 1995 sentence imposed ordered defendant Calloway to be imprisoned for life without parole. It was not procedurally reasonable because the court imposed it based on the erroneous "fact" that there was "the *potential* for *extreme* danger to the public." The flight crew and autopilot never lost control of the aircraft and indeed controlled it with such skill that it was maneuvered to help subdue Calloway. Their airmanship was so extraordinary that it became the subject of at least 3 documentary films and a book. As

the plane approached and landed safely in Memphis, Calloway was restrained and only semi-conscious in the cabin (not the cockpit) from injuries he sustained. Thus the court's "justification for its upward departure from the offense level prescribed by the sentencing guidelines for "heartland" cases: Mr Calloway's offense...(4) created the potential for extreme danger to the public." **116 F.3d 1137** is clearly erroneous and extraordinarily abusive of sentencing discretion in violation of the **APPRENDI RULE.** This provides one of many extraordinary and compelling reasons for sentence modification under the First Step Act.

The LWOP sentence was also substantively unreasonable because considering whether "the length of a sentence conforms with the sentencing goals set forth in 18 USC 3553(a)" and "whether the district court abused its discretion in determining that the 3553(a) factors supported the sentence imposed", Calloway's sentence is "greater than necessary" even if it "followed proper procedures and gave adequate consideration to the 3553(a) factors". See **U.S. v. Johnson 26 F.4th 726 (6th Cir 2022)** citing **U.S. v. Sherrill 972 F.3d 752,768 (6th Cir 2020)** and **Holguin-Hernandez v.U.S.140 S.Ct 762,766-67 (2020).**

18 U.S.C. 3553(a) Factor No. 1:

The nature and circumstances of the offense and the history and characteristics of defendant Auburn Calloway are as follows: Born and raised in Washington DC, Calloway was both a Cub Scout and a member of the Boy Scouts of America through his church as a child. Reared by *BOTH* working class parents, he attended public schools with 4 siblings graduating from high school with grades earning admission to Stanford University, completing his degree in 1974. His love of aviation led him to join the U.S.

Navy's Aviation Officer Candidate School, and later, earn his wings as a jet pilot in 1977 when he also married. Assigned as the first black Fleet Replacement Pilot for the Lockheed S-3A Viking Anti-Submarine Warfare aircraft in San Diego, he became a Carrier Air Group pilot aboard the now-retired USS Ranger. He resigned his commission as a navy lieutenant (O-3) in April 1982 and was honorably discharged with several decorations including two medals.

Movant then pursued his masters degree finishing in 1985 while rearing his first child. He was hired by FedEx in 1987-88 as a flight engineer but was never trained to fly company aircraft. His job application data was verified and so stamped on its cover. With no prior criminal record, unlike some FedEx flight crew members, Calloway worked for the anti-union company uneventfully up until the incident constituting the underlying offense. He was an asset to his community and started its first Neighborhood Watch group. During this imprisonment, he founded the Veteran Community Mentors and wrote its Mission Statement (**www.veterancommunitymentors.org**).

The nature of the offense and its circumstances are best described as follows: Firstly, it was *NOT* an act of "terrorism" but an act of somnambulism or "automatic behavior", according to William C. Dement, MD, Ph.D., professor of psychiatry (emeritus) at Stanford for more than 35 years. As Director of the Sleep Research & Disorders Center, Dr. Dement's experience exceeded the combined total experiences of all four "experts" at movant's trial. See **Dement, 4-paged letter dated October 12,1998.** addressed to this court (Appendix Ex 2).

Dr Dement is also author of the Foreward to "Sleep Disorders for Dummies," among other sleep-related tomes. Noteworthy in that Foreword, Dement states "The vast

majority of sleep disorders are missed or ignored and therefore remain untreated. Hundreds of thousands of people are dying each year in part because of undiagnosed and untreated sleep disorders." Dement's 1998 letter to this court reflects that he and his staff spent far more time, resources, and research into movant's condition during the offense than any "expert" testifying at trial, each of whom had a different diagnosis, or no diagnosis in the "opinion" of the government's hired-gun whose incentivized testilying was merely meant to defeat the insanity defense.

After bringing a multiplicitous indictment violating Calloway's Fifth Amendment right against double jeopardy at trial, one count was conceded to as over-charging by then-AUSA John Fowlkes during oral arguments, then vacated by Circuit Judges Lively, Nelson, and Ryan. **116 F.3d 1131** "The government concedes that interference with flight crew members is a lesser-included offense of attempted aircraft piracy. We shall vacate the interference conviction on the strength of that concession." There is no mention of the prejudicial due process violation at trial which rendered an *excessive verdict of guilt* with a *misconviction* resulting from erroneous fraudulent forensic testimony by mistaken "experts" ending in an erroneous voidable judgment imposing two manifestly excessive sentences that don't even allow a parole board to determine if movant is eligible for release on good behavior, rehabilitation, or the like.

Now, changes in the law and in Congressional and Judicial attitudes (not Executive branch attitudes, e.g. see Margaret Colgate Love's "The Twilight of Pardon Power") have finally remediated the Machiavellian sentencing aspect, somewhat, of the federal mass incarceration agenda. One example pertinent to this motion is the change in the law that sent movant to prison. Convicted under 49 USC 1472(i), that law changed to

49 USC 46502 Aircraft Piracy section (2): "An individual committing or attempting or conspiring to commit aircraft piracy--(A) shall be imprisoned for at least 20 years; or (B) notwithstanding section 3559(b) of title 18, if the death of another individual results from the commission or attempt, shall be put to death or imprisoned for life." Thus, this intervening change in law makes movant's LWOP sentence justiciable under FSA jurisprudence as there were no deaths nor life-threatening injuries in this case.

IMPORTANT NOTE:

18 USC 3559 Sentencing classification offenses sections (b) and (c) state--"(b) Except as provided in subsection (c), an offense classified under subsection (a) carries all the incidents assigned to applicable letter designation, except that, the maximum term of imprisonment is the term authorized by the law describing the offense." "(c) Imprisonment of certain violent felons. (1) Mandatory life imprisonment. Notwithstanding any other provision of law, a person who is convicted in a court of the United States of a serious violent felony shall be sentenced to life imprisonment if---(A) the person has been convicted (and those convictions have become final) on **SEPARATE PRIOR OCCASIONS** in a court of the United States or of a State of---(i) 2 or more serious violent felonies; or (ii) one or more serious violent felonies *and* one or more serious drug offenses;"

As this fails to apply to movant, Calloway's life sentence is **ILLEGAL** *and* unconstitutionally violative of the 5th, 6th, and 8th Amendments forming the only necessary "extraordinary and compelling" reason any reasonable court needs to reduce his draconian sentence to time-served.

18 USC 3553(a) Factor No. 2:

The need for the sentence imposed---(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide *just PUNISHMENT* for the offense: "...the district judge made it clear that she thought the appropriate sentence for each offense was life imprisonment." **116 F.3d 1137**. On August 11, 1995, the Honorable Julia Smith

Gibbons, presiding over the sentencing of defendant Calloway, said:

1) "...this is not a case in which Mr Calloway has accepted responsibility ."
2) "The proof at trial with respect to the insanity defense revealed more a defendant who was attempting to use the best available means to avoid responsibility in this case than one as to whom there was a legitimate issue as to insanity."
3) "...a defendant who accepted responsibility would have displayed a far different demeanor throughout the trial. There has been nothing until this rather belated, immediately prior to sentencing, expression of regret to the victims, there has been nothing about Mr Calloway's conduct that suggests that he regrets what happened, that he feels anything other than concern for his own legal situation, and the Court cannot under those circumstances find acceptance of responsibility."
4) "The Court notes that Mr. Calloway made no statement concerning his guilt or his role in this offense to the probation officer, and, again, while that is not determinative of acceptance of responsibility, it is again something to be considered in evaluating whether the defendant has demonstrated acceptance of responsibility, and there has just been no indication of that here."
5) "There is no basis for a downward departure in this case. The guidelines clearly consider under what circumstances diminished capacity or mental condition might be a basis for a downward departure. It is plain that this situation, which involves a crime of violence, is not under the guidelines an appropriate occasion for a downward departure."
6) "...there is really nothing else about this case that would provide for a lesser sentence based on any mental instability or disturbance that Mr Calloway might have had."
7) "With respect to the request for upward departure, the guidelines set out the circumstances in which the Court may impose a sentence outside the guideline range. Section 5K2 says that if the Court finds that there is existing aggravating or mitigating circumstances of a kind or to a degree not adequately taken into consideration by the sentencing commission in formulating the guidelines, that should result in a sentence different from that described ."
8) "...it's plain that very significant physical injuries did result to each of the victims.""...and certainly the photographs introduced by the government graphically reveal that there was very significant physical injury involved."
9) "The injury was inflicted as a result of calculated intentional conduct, conduct that was very, very dangerous to the victims."
10) "Property loss or damage. Certainly there was significant property loss and damage here, and that is not taken into account in the guidelines."
11) "Finally, and very important...is the potential danger to the public that this situation posed. This was a situation in which the potential for catastrophe was great...as they fought for their own lives and for the safety of other people, and it was only through their display of all those attributes of character that the catastrophe was avoided, and it was in no way attributable to any conduct of Mr. Calloway that the catastrophe was avoided, so the burden of the potential for great harm to others falls squarely upon him."
12) "The Court has determined that the particular *circumstances* here are sufficiently *unusual* to warrant departure." (**NOTE:** See also ‘extraordinary’ and ‘compelling’ definitions.)

13) "Given the *very unusual circumstances* of this case, the Court will grant the request of the government and will set the offense level at 43 and will sentence Mr. Calloway to *LIFE IN PRISON*."
14) "...obviously, Mr. Calloway is an individual of great ability. He could have contributed much if he had directed himself differently..."
15) "...really there is no lesser sentence that adequately addresses the gravity of the crime, the actual harm that resulted, and the potential harm that was averted only by the most *unusual of circumstances* and fortuitous circumstances."
16) "To the extent that Mr. Calloway's mental *instability* plays a role in this at all, it argues for the life sentence, because the court could not *FEEL* confident that Mr. Calloway would be able to conduct his life in a way that did not pose harm to others if he were released."

NOTE: No expert at the trial testified to any "mental instability" on movant's part. In fact, the government's psychiatrist opined the diagnosis of "Malingering", and the government's psychologist did NOT diagnose malingering but had no mental illness diagnosis at all. An unfounded judicially diagnosed mental condition that never saw corroboration during movant's 2-weeks long courtroom appearance based on a "feel" of no confidence not supported by movant's conduct *prior* to the offense throughout 40 plus years of life nor by his conduct over the 18 months duration of his presentencing/pretrial detention without bail or bond, is *manifest error of fact*, by definition per Black's Dictionary.
17) "While it is true that he had no prior record, and this was an unexpected course of conduct at the time it occurred, THE INFORMATION THAT THE COURT HAS RECEIVED ABOUT MR. CALLOWAY IN THE COURSE OF THIS PROCEEDING DOES GIVE THE COURT SOME CONCERN ABOUT WHAT HIS CONDUCT WOULD BE IF HE WERE RELEASED FROM PRISON AT A FUTURE TIME."

NOTE: Without stating any facts or evidence underlying her "*information"* Julia Smith Gibbons' conclusory reliance on her undisclosed "information" unconstitutionally, procedurally, substantively, and erroneously justified her life sentence imposition.
The above excerpts are from the Sentencing transcript in Appendix Ex 8.

Movant's 1995 sentence, in the context of Appendix Ex 9, a USA Today Snapshot titled "Serving more time for a crime", does not "provide just punishment for the offense" where, as reflected in the Bureau of Justice Statistics chart, "The average time a criminal spent in prison for a violent crime rose from 39 months in 1990 to 45 months in 1999.", a minuscule fraction of Calloway's LWOP sentence and of his nearly 29 years of imprisonment already served.

Thus, this court is moved to reduce his sentence to time served under section

3553(a)(2)(A) where the "seriousness of the offense" based on the evidence rather than speculations, conclusory rebuttable presumptions, or "information" undisclosed to the parties *AND THE JURY* but relied on by this court to justify the draconian sentence imposed on an otherwise law abiding honorably discharged decorated veteran who had not committed any violent crime before nor in the 29 years since the punishment was imposed. See Sentencing transcript p.49 lines 23-25, and p. 50 1-3! Thus there is no need for deterrence nor for protection of the pubic from further crimes of an otherwise law abiding defendant (3553(A)(2)(B) and (C).

As for 3553(a)(2)(D), nearly 29 years of federal imprisonment *has NOT* provided movant with needed medical care in the most effective and timely manner! To the contrary, this extraordinary and compelling reason for immediate release is easily persuaded by the following facts documented in the Appendix to this motion as exhibits:

FACT 1 -- Degenerating Infirmities Due to BOP Indifference

Movant's cardiopathy, discovered by a variety of examinations and examiners, including Dr Michael S. Kim, at St. Francis Penrose Hospital in Colorado Springs (see Appendix Ex 6 and 10), who performed a heart catheterization in January 2022, has been improperly monitored. During an arduous 2-months-long "Diesel Express" styled transfer from Colorado to Pennsylvania via Oklahoma, Atlanta, Kentucky, Atlanta again, and Oklahoma again, his cardiopathy was not monitored at all by any BOP medical doctors.

On 10/20/22, movant was called to a medical appointment at USP Allenwood which confirmed that the medical department had no record at all of Dr. Kim's prescription recommendation communicated to the movant in April, despite his multiple prior written

requests that the records be retrieved (Appendix Ex 10). The seriousness of his cardiopathy was revealed to him for the very first time ever based on older records medical staff had. Despite BOP having those computerized records at USP Florence, Federal Transfer Center OKC, BOP Holdover Unit Atlanta, and USP Big Sandy, Kentucky, movant was kept in the dark, abandoned, as well as improperly monitored, and not monitored at all during the 9-months long period since Dr Kim's heart operation. Since that time, Calloway's condition has worsened but he only has nitroglycerin as a stop-gap medicine to relieve frightening chest discomfort.

Thus defendant Calloway has *NOT* been provided with needed medical care and/or other correctional treatment in the most effective manner consistent with what the U.S. Senate Judiciary Committee discovered during its April 15, 2021 "Hearing on the Federal Bureau of Prisons".

How 18 USC 3553(a) Factor No.3 Applies to Calloway's Case:

Moore's Federal Practice - Criminal states: 18 USC 3553(a)(3) requires that the judge consider "the kinds of sentences available". This provision addresses two concerns. The first involves cases where prison sentences are imposed when sentences involving less restraint on liberty would serve the ends of effective sentencing equally well.

The Kinds of Sentences Available: There have been extremely few aircraft piracy and attempted aircraft piracy cases with convictions for such offenses in the U.S. since the Wright brothers invented the airplane. But there have been thousands of interference with flight crew cases with extremely few brought before both grand and petit juries (See **U.S. v. Allen 2019 U.S. App.LEXIS 33245**: (plea bargain to probation, then, only 11 months imprisonment when probation was repeatedly violated). Of those few, movant

cannot find any, not even one, where the defendant was sentenced to LWOP.

Chief among the kinds of sentences available was no prison sentence at all where plea bargains to a period of probation appears to dominate the legal landscape of these three offenses. A stipulation to the NGRI defense in this case would have obviated the 18-months long expensive legal proceedings where the conspicuously corroborative evidence conveyed the virtue and veracity of the defense (e.g. movant's bringing an uncharged pneumatic speargun, nearly $700 in cash, cartons of nails, 4 hammers, etc.).

Supervised sleep therapy and education under the auspices of Sleep Medicine Specialists pursuant to a stipulated NGRI was called for in this case 29 years ago but was not achieved due to the government's bad faith fealty and financial interest conflicted prosecution. A sentence modification to time served is justice served in this case and defendant Calloway moves this court to order his immediate release to accomplish his release plan (Appendix Ex 12). See **U.S. v. Johnson 2022 U.S. App. LEXIS 4835.** "The court referenced its prior reasoning from Johnson's resentencing, where the court stated that the 300 month sentence would "keep defendant confined until he is in his 50's at which point the threat he poses to the public should be substantially diminished and is one society can risk." Calloway turned 50 more than 20 years ago! "Johnson is now 48 years old and has a decreased risk of recidivism due to his age. U.S. Sentencing Commission, *The Effects of Aging on Recidivism Among Federal Offenders* 22 (2017)". Id at 27 (See also Office of the I.G. U.S. DOJ, "The impact of an Aging Inmate Population on the FBOP 40).

How 18 USC 3553(a) Factors No. 4 and 5 Apply to Calloway's Case:

In **U.S. v. Damien Hughes 2021 U.S. Dist. LEXIS 13243,** Samuel H. Mays, Jr. cites

his conclusion that "the 3553(a) factors counsel against compassionate release in Hughes's case, as the government notes." Hughes is a drug dealer whose "original motion on June 22, 2020" was denied "because Hughes has a significant criminal history." There were also "no cases of COVID-19 in Hughes's facility." Most importantly, Hughes's criminal history "includes a conviction for attempted *FIRST-DEGREE* MURDER." (emphasis added). Auburn Calloway has no criminal history and certainly none that includes attempted murder. Yet this court modified Hughes's "term of imprisonment to *TIME SERVED."* (imagine that! emphasis added even more emphatically).

Would this court *NOT* do the same for an honorably discharged decorated veteran of the U.S. Navy suffering multiple medical infirmities, COVID-vulnerable as a geriatric ward of a Congressionally condemned callously indifferent incarceration bureaucracy whose own Inspector General *and* federal courts have criticized?

SUMMARY

This case is ripe for compassionate release in every respect and is long overdue. The exceedingly extraordinary and countless compelling circumstances qualifying consideration of this motion by this court, with all relevant 18 USC 3553(a) criteria being met, the FSA does not stand in isolation for a sentence reduction order to time served. The longstanding Rule of Lenity and the Proportionality Principle apply as well. The SCOTUS in its **Concepcion v. U.S.** holding has given district courts the widest latitude ever to use their discretion to grant sentence reductions under the FSA, consistent with the goals of Congress and the U.S.S.C.

The sentence in this case was given after the jury rejected movant's insanity plea. He has been imprisoned since his arrest at the end of the incident on April 7, 1994, nearly 3 decades ago. Ordering that compassionate release be granted with time served, and not burdening taxpayers further with unnecessary supervision, is the just and appropriate thing to do. It can also promote fairness in the U.S. justice system in several very specific ways:

First, the grant of compassionate release would point a way to remedying sentences which, under today's law, were unconstitutionally imposed.

Second, it could point the way towards addressing the problem of incarcerated persons who should have been placed in mental health treatment rather than prison.

Third, with the relevant and appropriate dicta, this court's *PUBLISHED ORDER* granting immediate release at time served would dampen the damaging effect of prosecutorial vindictiveness and misconduct on our system of justice that was only hinted at as "errors" made by then-AUSA John Thomas Fowlkes, Jr., in the dicta of the appellate court's reversal of Eric Antonio Parker's conviction.

Fourth, it could *show* genuine *gratitude* for service to country for errant but worthy veterans and a commitment to giving them a second chance.

Based upon the facts proven to the jury beyond a reasonable doubt, Calloway should have received a USSC Guidelines sentence of between 235 months (just under 20 years) and 295 months (just under 25 years). Based on additional facts, not proven to a jury nor proven on the basis of a reasonable doubt standard, the sentence was enhanced to life imprisonment without parole. The increased sentence is today illegal under **U.S. v. Booker 543 U.S. 220 (2005)**. The then-mandatory guidelines sentence can, under the

Constitution, only be exceeded on the basis of facts proven to a jury beyond a reasonable doubt .

Movant Calloway has been deprived of his freedom for nearly 29 years which exceeds the constitutional maximum of 24 years 7 months. Now, the SCOTUS ruling in **Concepcion** interpreting judicial discretion under the FSA finally offers relief.

Movant Calloway has "done his time" as was authorized by the facts found by the jury. If he is granted release now, there is no sense in which he will be "getting away" with anything.

The only relief that movant Calloway has from this draconian sentence, which is unconstitutional, is from this court. A time-served compassionate release is the only way this movant can be spared from an otherwise sentence of death-in-prison from the "Tripledemic" of COVID-19, RSV (Respiratory Syncytial Virus) and Flu, or any number of life-threatening mismanagement practices exposed at the Senate Judiciary Hearing on the Federal BOP on April 15, 2021, already experienced by this movant.

6TH CIRCUIT JUDGE JULIA SMITH GIBBONS

The sentencing judge was former U.S. District Court Chief Judge Julia Smith Gibbons. Her history as a district judge includes **U.S. v. Thomas 699 F. Supp. 147 (W.D.Tenn. 1988)**, a case that she auspiciously declared that the Sentencing Guidelines were *unconstitutional.* In 1990, she issued two sentences to Paul Stein. One she imposed under the law prior to November 1, 1987, and one imposed under the Sentencing Guidelines. See **U.S. v. Paul Stein 897 F. 2d 530 (March 7, 1990)** (unpublished: see printout in Appendix Ex____). The conspicuous incongruity between her published declaration against the guidelines and her use of them with draconian effect against

Calloway cannot be mistaken for anything other than an extraordinary and compelling reason for this court to order his immediate unconditional release with time served.

Other 6th Circuit appeals court cases, some with Judge Gibbons on the panel, warrant sentencing relief by this court. See **Morrell v. Wardens 12 F. 4th 626 (6th Cir 2021)** ("The undisputed constitutional violation justifying habeas relief in these cases was the application of Michigan's former mandatory sentencing guidelines" which compelled a trial judge in certain circumstances to impose a mandatory minimum sentence beyond that authorized by the jury verdict." "This inclusion of judicially found facts violated defendant's 6th Amendment right to a jury trial because any fact that increased defendants' mandatory minimum sentences must be either admitted by the defendant or proven by a jury beyond a reasonable doubt." (Citing **Alleyne v. U.S. 570 U.S. 99 at 111-12 (2013).**

Still others include **Williams v. Hampton 820 Fed. Appx. 371 (6th Cir 2020)** (sentencing judge violated Blakely v. Washington 542 U.S. 296 (2004) and 6th Amendment jury trial right by relying on aggravating fact not found by jury to impose sentence above presumptive minimum."); **Robinson v. Woods 901 F. 3d 710 (6th Cir 2018)**("Michigan trial court violated 6th Amendment right to a jury trial by using judge-found facts to score sentencing variables that increased...mandatory minimum sentence").

Then there's **U.S. v. Bruce 396 F.3d 697 (6th Cir 2005); U.S. v. Walters 775 F.3d 778 (6th Cir 2015)** and **U.S. v. Volkman 736 F.3d 1013 (6th Cir 2013)** ruling that for a sentence to be substantively reasonable, a major departure from the Sentencing Guideline range should be supported by a more significant justification than a minor one.

CONCLUSION

Movant Auburn Calloway has had a comprehensive release plan for more than a decade in anticipation of executive clemency under Barack Hussein Obama which never materialized. Adamantly limiting sentence commutations and pardons to "non-violent offenders", Obama's **Clemency Initiative** director Cynthia Roseberry, and his Pardons Attorney, Deborah Leff, refused to consider Calloway's application. Clemency non-consideration without denial continued under Donald Trump, and, so far, continues under President Joseph R. Biden's Department of Justice.

Past and recent presidents have all fully pardoned mass murdering monsters and brutal willful killers like Lt. William Calley, Lt. Michael Behenna, Eddie Gallagher, and others. Calloway's only hope appears to be this court while his clemency application continues to be ignored in parallel with his Administrative Remedy Requests of the BOP for compassionate release.

Based on at least two documented medical infirmities, cardiopathy and hypertension, both recognized by the CDC as COVID-19 risk factors, as the nation now endures a triple pandemic, climate change, and the inception of World War III in the Ukraine on February 24, 2022, compelling reasons for release are made all the more extraordinary.

Movant Calloway has no personal history of mental illness albeit a family history with his mother. Indeed, he has been designated by the BOP throughout his lengthy imprisonment as a "CARE-1 Mental Health" status inmate, i.e. *not* in need of mental health treatment of any kind.

Not so with Carlos Jesus Figuera who was convicted of *Attempted Air Piracy* circa 1980-81 in Florida. See **666 F.2d 1376.** Figuera's jury also rejected *his* NGRI but he

was sentenced to *only* 20 years imprisonment, the statutory *MINIMUM!* Despite this lenity by that federal trial court, the 11th Circuit Appeals Court *REVERSED* his conviction!

No one, not William Harry Hack, Jr**. (U.S. v. Hack 782 F.2d 862 (10th Cir 1986)** nor Zvonko Busic **(U.S. v. Busic 592 F.2d 13 (2d Cir 1977) (convicted of *air piracy* and *killing a police officer* with a bomb but released from a life sentence after ~30 years and deported)** has been imprisoned for life *without parole* for violating 49 USC 1472(i) except Auburn Calloway as far as could be found through research for this motion. Why?

Dwight D. Allen pled guilty but was only sentenced initially to 3 years *probation* until the sentencing court "did not know what else to do with an individual who continues to use drugs and was not compliant with treatment options...". "The district court found that defendant was a *danger to* himself and particularly to others...". Allen was then sentenced to *11 months (NOT YEARS!)* in prison for pleading guilty to Interference with Flight Crew. **49 USC 46504. See 2019 U.S. App. LEXIS 33245 No. 19-3522 6th Cir 11/6/19).**

Why did this court sentence this movant to life in prison for the same offense and why did the government, i.e. John Thomas Fowlkes, Jr., and Veronica Coleman Davis (a Federal Express shareholder and former staff attorney) ask this court for that sentence? See movant's "Release Plan" Appendix Ex. 12. This court is moved to correct this travesty of justice.

****

Extraordinary and compelling reasons for sentence modification cannot be reduced to an exhaustive list. The cases and commentaries have shown that it is impossible to

anticipate the entire universe of circumstances that warrant compassionate release. The 6th federal circuit has a more restrictive view of "extraordinary and compelling reasons," but courts have nonetheless granted FSA sentence reductions to far younger movants with fewer less serious infirmities and long criminal histories whose cases include murder, mayhem, and molestation of children, leaving little doubt that dangerous psychopaths and sociopaths have been released to re-enter society. Would this court *not* grant this movant immediate release after 29 years imprisonment of an honorably discharged decorated veteran with no prior criminal history and very few prison rules infractions (some of which were fabricated by retaliatory BOP staff)? Appendix Ex____ (See also **Jerra v. U.S. 2015 U.S. Dist. LEXIS 199468 (Oct. 19, 2015)** (James Jerra prevailed in a jury trial vs. BOP's LOM staff for abusing him in a way that pales in comparison to the decades long abuses suffered by this movant while in BOP custody at *every* prison where this movant has been assigned for over ~29 years. Jerra won a jury verdict under U.S. District Judge Otis Wright of more than $500,000 dollars. The government's lawyers dropped their appeal ostensibly because of concern that any unfavorable *published* appeal would become precedential helping future inmates. None of Jerra's respondents lost their jobs to the knowledge of this movant, but continued to similarly abuse other inmates with less legal savvy than Jerra.

Should this pleading prevail, movant is left with nothing more than a Pyrrhic victory in view of the extraordinary length of his incarceration thus far. The government's relentless over-zealous prosecution of this case, in cahoots with federal courts, has left the federal constitution itself a casualty alongside movant's civil death and disabilities which inevitably follow his release.

"Justice requires that this court take up the merits of Kelly's motion", see **U.S. v. Kelly 2020 U.S. Dist. LEXIS 77080 May 1, 2020**, dicta by U.S. Dist. Judge Carlton W. Reeves, Chairman U.S. Sentencing Commission, granting compassionate release to Lemarkus Kelly at the age of *26 years old*, suffering from *no infirmities whatsoever* but agreeing with Kelly, who pled guilty to one serious *violent* crime, that he is still at high risk while incarcerated!! **NOTE:** Judge Reeves should run for president of the United States. He would certainly have this movant's vote, if movant ever gets to vote again.

If the long moral arc of the universe bends toward justice, as Dr Martin Luther King, Jr. said, let this motion be *unconditionally granted.*

ADDENDUM

Defendant Calloway requests that the court consider this motion fairly and on an emergency basis along with the adjunct requests the court is moved to rule on. This Addendum enhances the court's discretion to consider the plethora of cases in this circuit and others which have held that [POTENTIAL] exposure of a vulnerable inmate to COVID-19 is an extraordinary and compelling reason warranting release. Expeditious review of this motion on an emergency basis should be made because defendant is now under the threat of being transferred, yet again, to yet another undisclosed BOP prison with hundreds of other inmates pursuant to a prison population transition imposed on USP Allenwood, his present location for only 6 months!

This latest transfer makes the 8th transfer in 22 months! No social distancing is maintained between transferees and staff nor does anyone wear masks while less than half of both groups have been vaccinated. This imminent unforeseen dangerous change in circumstances calls for immediate adjudication of this motion by the court under the 'emergency doctrine' or "sudden peril rule" to avert and remedy harm from current exigent circumstances. See Lewis v. Sullivan 279 F.3d 526, 531 (7th Cir 2002)("The imminent-danger language must be read instead as having a role in those cases where time is pressing...when a threat or prison condition is real or proximate, and when the potential consequence is serious physical injury then the courthouse doors are open.")

Rather than provide this court with vague, speculative, or conclusory allegations as to the BOP's conduct towards movant Calloway, he has made specific factual averments of ongoing serious physical injury and neglect in a pervasive pattern of misconduct evidencing the likelihood of imminent serious physical injury that threatens continuing or

future injury. This doctrine is only invoked here to persuade this court to expedite its adjudication of this motion and order movant's immediate release (unrelated to any PLRA "3 strikes" proviso which does not apply here).

The USSC has announced proposed guidelines amendments which Calloway moves this court to judicially notice. One proposed amendment refers to the defendant being a victim of physical abuse resulting in serious bodily injury committed by a correctional officer or other employee or contractor of the BOP while in custody [and] Changes in Law ("The defendant is serving a sentence that is inequitable in light of changes in the law.").

Most importantly, the proposed amendment adds an "Other Circumstances" category which applies to [all motions filed] under 18 USC 3582(c)(1)(A) regardless of whether the motion is filed by the BOP or the defendant. One circumstance provides that it would be inequitable to continue the defendant's imprisonment or require the defendant to serve the full length of the sentence as a result of changes in defendant's circumstances [or] intervening events that occurred after defendant's sentence was imposed.

FINAL AMENDMENT TO MOTION FOR REDUCTION IN SENTENCE

Due to new developments and changed custody circumstances for movant , movant Calloway amends this motion with the following relevant recent events.

EVENT 1

On March 8, 2023, after 28 negative results for COVID swab tests since 2020, and 2 vaccinations (Pfizer) followed by 2 boosters (one Pfizer, one Moderna) as well as taking the flu vaccine for the first time ever (movant is averse to vaccines), Calloway nonetheless contracted COVID and became severely ill at the BOP Federal Transfer Center (FTC) in Oklahoma City (OKC). BOP staff here, most of whom are not vaccinated, no longer observe pandemic protocols with at least two staffers saying "We treat COVID like it's a common cold now."

After being involuntarily transferred from USP Allenwood with hundreds of other inmates for a "mission change" for that facility, Calloway was packed into overcrowded holding cells, crowded onto buses and planes with no social distancing between inmates, and forced to share a cell with
other [black] inmates of unknown COVID infection and vaccination status (the BOP practices racial segregation in cellmate pairings in stark violation of federal law).

Despite presenting a 105 degree fever, coughing with fluid-filled lungs on stethoscope examination, and a dangerous high blood pressure reading, 71 years-old Calloway's request to be hospitalized was denied. Instead, FTC medical and custody staff detained him in the SHU in solitary confinement under harsh cold disciplinary segregation conditions camouflaged as "quarantine".

Calloway's multiple Administrative Remedy Requests for [TEMPORARY] single cell housing have only been denied since 2022 along with all appeals so far.

EVENT 2

Movant has learned of the "New Law" Elderly Inmate Reduction in Sentence jurisprudence which allows "Non-medical" releases at the 30 years of federal incarceration milestone.

U.S. District Judge Charles R. Breyer released inmate Robert M. Linsley at time served despite Linsley [NOT] having served 30 years but only 20. Judge Breyer used Linsley's prior time in California state prisons to justify his release where the aggregate time served reached 30 years.

This movant will have served 30 years [FEDERAL] time a year from now (April 2024) which will amount to the same [MAXIMUM] sentences received by Gregory and Travis McMichael, convicted of their "hate crime" brutal murder of Ahmed Arberry, an unarmed black man jogging through
their neighborhood. When [their] crime is compared to this movant's offense, would it serve justice to delay this movant's release until he has served the McMichael's maximum imposed sentence? See <U.S. v. Linsley>, 2020 U.S. Dist. LEXIS 127488.

EVENT 3

Movant Calloway has also learned with great pleasure that fellow federal inmate Scyrus Dion Hebert has been released from prison via an ORDER GRANTING MOTION FOR SENTENCE REDUCTION by U.S. District Judge Thad Heartfield, who sentenced Hebert in 1996 to 215 years in prison for multiple violent crimes using a firearm and trying to escape,

assaulting a prison guard in the process (see <U.S. v. Hebert>, 574 F. Supp. 3d 416; 2021 U.S. Dist. LEXIS 239059).

The most striking features of Judge Heartfield's release of Hebert that are relevant to this case are:

1) Hebert is only 50 years old;

2) Hebert's Compassionate Release under 18 U.S.C. 3582(c)(1)(A) has absolutely [NOTHING] to do with COVID or any medical infirmities arguable as "extraordinary and compelling reasons".

3) Judge Heartfield reasoned "The severity of Hebert's sentence...represents the type of sentence Congress deemed unjust in the First Step Act---relative to those imposed for both similar and more severe crimes." citing <McCoy v. U.S.> 2020 U.S. Dist. LEXIS 93730, aff'd 981 F. 3d 271 (4th Cir 2020).

4) Judge Heartfield acknowledged that "The inconceivable magnitude of Mr. Hebert's sentence is difficult to comprehend...His sentence is unforgiving by any measure: [L]ife without parole is "the second most severe penalty permitted by law."" citing <Graham v. Florida>, 560 U.S. 48, 69 (2010).

5) Judge Heartfield further states with particular relevance to Calloway's case: "Mr. Hebert's current sentence greatly exceeds the sentence of other violent crimes. Indeed, he has already served more than the average sentence for all of these crimes. The factors consisting of the changes in sentencing laws, the length of Mr. Hebert's sentence, the gross sentencing
disparity compared to other violent crimes all weigh in favor of extraordinary and compelling circumstances to warrant a sentence reduction.".

6) Citing <Graham>, 560 U.S. at 71: "A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense." This surely applies to Calloway's case as does "Mr Hebert's sentence is an aberration, and the lack of consistency and gross deviation from the mean lessen any chance of deterrence for others."

7) Finally: "The Court sees no reason as to why Mr Hebert's incarceration should continue...given the extensive prison sentence he has already served, nothing is gained by incarcerating [Mr] Hebert for the rest of his life, especially in light of Congress's judgment that such sentences are inappropriate."

EVENT 4

In <U.S. v. Frederick Mervin Bardell>, 2022 U.S. Dist. LEXIS 181785 Oct.4, 2022, Judge Roy B. Dalton, Jr. held the BOP [and] Calloway's current warden at the BOP's FTC OKC in contempt of court and sanctioned both for "reckless disregard" in the Compassionate Release of inmate Bardell who died 9 days after his release due to the BOP's and FTC Warden Kristi Zook's negligence and deliberate indifference to inmate Bardell's health, safety, and security. Because this movant has contracted COVID under Warden Zook's custody, a consistency is shown with the Special Master's revelations in the Bardell case (see 2022 U.S. Dist. LEXIS 209882 investigation by A. Lee Bentley, temporary Special Master).

Thus with grave reason, Calloway moves the U.S. District Court in Memphis to expedite his immediate release on an existential emergency basis as his incarceration

crisis has now resulted in contracting COVID despite being vaccinated, boosted, wearing a double-mask, and hopelessly

requesting a medically prophylactic single-cell accomodation. This new extraordinary and compelling circumstance is truly life-threatening whereby the BOP and Warden Kristi Zook are once again "blatantly violating and disregarding human dignity" as in the Bardell case.

EVENT 5

Movant Calloway has mailed the attached letter to the Memphis U.S. Attorney Kevin Gafford Ritz requesting that movant's release be initiated by the government. Thus far, Mr Ritz has not responded.

A second printout of that letter is included with Ritz's Service Copy of this motion.

______________________________   ________________________

Auburn Calloway   Date

I certify that this motion and its Appendix has been given to FTC OKC staff for mailing to the U.S. District Court in Memphis Tennessee and to U.S. Attorney Kevin Gafford Ritz in the same building albeit Suite 800.

CERTIFICATE OF SERVICE

AND

SWORN DECLARATION OF FACT

I, Auburn Calloway, honorably discharged and decorated veteran of the United States Navy and movant for Compassionate Release under the First Step Act and the United States Constitution, inter alia, hereby declare under penalty of perjury, that to the best of my knowledge and belief, *all* averments in this motion, whether supported by the Appendix exhibits or not, are true and correct, and that this motion has been handed to Federal Bureau of Prisons officials at the United States Penitentiary Allenwood in White Deer, Pennsylvania for "SPECIAL MAIL" mailing to the U.S. Attorney in Memphis, Tennessee.

Kevin G. Ritz
167 N. Main Street, Suite 800
Memphis, TN 38103

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AUBURN CALLOWAY DATE