


Compassionate Release in the Age of COVID-19

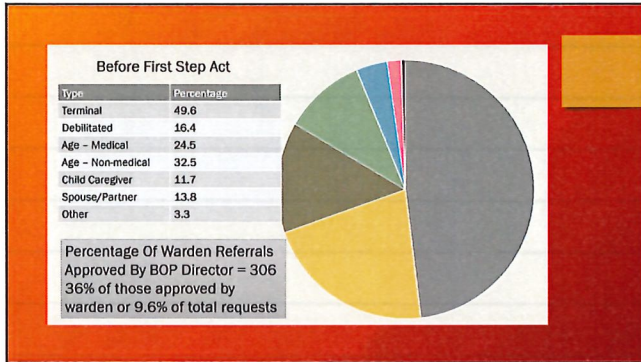
Thanks to Brianna Mircheff
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A Brief History Lesson



Pre-First Step Act:

- Only BOP could make a motion
- BOP rarely made motion
- In 2011, 33% died before request considered
- Defendant limited to challenging BOP's decisionmaking process





Post-First Step Act:

- Defendant and defendant's counsel can file motions too, not just BOP
- If the BOP doesn't act quickly, they get bypassed all together.

What is Compassionate Release?

- Compassionate release permits the district court to reduce a defendant's previously imposed sentence
- With or without new conditions of supervision (i.e., home confinement, etc.)
- But s/he has to ask the BOP first
- And s/he has to prove "extraordinary circumstances"

Who's the target?

- Ordinarily targeted to those who are elderly or medically debilitated.
- Have to be able to plausibly request that the sentence be reduced to time served
 - Rule of thumb: if client were to be resentenced today, with all medical conditions, etc., would I think it was crazy to ask for time served?

18 U.S.C. §3582(c)

- (c) MODIFICATION OF AN IMPOSED TERM OF IMPRISONMENT.—The court may not modify a term of imprisonment once it has been imposed except that—
- (1) in any case—
 - (A) the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—
 - (i) extraordinary and compelling reasons warrant such a reduction; or
 - (ii) the defendant is at least 70 years of age, has served at least 30 years in prison pursuant to a sentence imposed under section 3553(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g);
- and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission;

What is *not* compassionate release...

- BOP's home confinement program
- Furlough
- Bail pending appeal
- DM2 and old guideline amendments
- Bail pending habeas

“Buckets” of extraordinary circumstances



- Terminal
- Elderly (age)
- Medical
- Family
- “Stand alone”

“Buckets” of extraordinary circumstances



- These buckets are found in U.S.S.G. 1B1.13...
- These are the buckets the district court will look at
 - Strangely, the BOP looks at different “buckets” with different criteria
 - Use USSG buckets for screening and triage.



USSG §1B1.13

Upon motion of the Director of the Bureau of Prisons under 18 U.S.C. § 3552(c)(1)(A), the court may reduce a term of imprisonment (and may impose a term of supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment) if, after considering the factors set forth in 18 U.S.C. § 3553(c), to the extent that they are applicable, the court determines that—

(1) (A) extraordinary and compelling reasons warrant the reduction; or
 (B) the defendant is (i) at least 70 years old; and (ii) has served at least 30 years in prison pursuant to a sentence imposed under 18 U.S.C. § 3559(c) for the offense or offenses for which the defendant is imprisoned;

(2) the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g); and

(3) the reduction is consistent with this policy statement.

APPLICATION NOTES TO §1B1.13

• 1. Extraordinary and Compelling Reasons.-Provided the defendant meets the requirements of subdivision (2), extraordinary and compelling reasons exist under any of the circumstances set forth below:

USSG §1B1.13, App Note 1.A. Terminal

(A) Medical Condition of the Defendant.—

(i) The defendant is suffering from a terminal illness (i.e., a serious and advanced illness with an end of life trajectory). A specific prognosis of life expectancy (i.e., a probability of death within a specific time period) is not required. Examples include metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced dementia.

Elderly

(B) Age of the Defendant.—The defendant (i) is at least 65 years old; (ii) is experiencing a serious deterioration in physical or mental health because of the aging process; and (iii) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.

Family Circumstances & Other Reasons

- (C) Family Circumstances.—
 - (i) The death or incapacitation of the caregiver of the defendant's minor child or minor children.
 - (ii) The incapacitation of the defendant's spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner.
- (D) Other Reasons.—As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).

BOP POLICY STATEMENTS

- BOP Program Statement 1330.18 & Program Statements 5050.49 Administrative remedies at BOP & definition of "extraordinary & compelling"
- Debilitating medical condition (any age): "Capable of only limited self-care and is confined to a bed or chair more than 50% of waking hours."
- Includes cognitive deficits
- Age-related w/ medical: 65 yrs old + 50% of sentence + chronic or serious age-related condition + diminished ability to function in correctional facility
- Compare to 1B1.13 -10 yrs/75% (lesser), no ability to function requirement

What is the BOP looking for? (PS 5050.50)

Elderly Medical

- 65 years or older
- Suffers from chronic or serious medical condition related to the aging process
- Experiencing deteriorating mental or physical health that substantially diminishes their ability to function in correctional setting
- Has served at least 50% of sentence

Elderly

- 65 years or older
- Who has served the greater of 10 years or 75%

Terminal

- Life expectancy of 18 months or less and/or has a disease or condition with an end-of-life trajectory under 18 USC § 3582(d)(1).

MORE BOP: PS 5050.50 Section 7

Overall, for each reduction in sentence request, the BOP should consider whether the inmate's release would pose a danger to the safety of any other person or the community.

- Nature and circumstances of the inmate's offense.
- Criminal history.
- Comments from victims.
- Unresolved detainers.
- Supervised release violations.
- Institutional adjustment.
- Disciplinary infractions.
- Personal history derived from the PSR.
- Length of sentence and amount of time served. This factor is considered with respect to proximity to release date or Residential Reentry Center (RRC) or home confinement date.
- Inmate's current age.
- Inmate's age at the time of offense and sentencing.
- Inmate's release plans (employment, medical, financial).
- Whether release would minimize the severity of the offense.


How do I start?



Motion Contents

- Compliance with exhaustion...or not
- “Extraordinary and compelling circumstances” = Compliance with U.S.S.G. 1B1.13...or not
- Section 3553(a) analysis
 - Including defendant is not a danger to the safety of any person or the community under 18 USC 3142(g)
 - Including release plan

Step One: Exhaustion



18 U.S.C. 3582(c)(1)(A)

“[U]pon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant’s behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant’s facility, whichever is earlier”

Step One: Exhaustion

"Fully exhausted" admin remedies process

- BP-9: request for reduction in service with the warden
- BP-10: appeal to the appropriate regional director within 20 days of warden's denial
- BP-11: appeal to the general counsel within 30 days of regional counsel's denial.

Step One: Exhaustion



Or the "lapse" of 30 days from receipt by warden

Do we really have to wait 30 days? Can we accelerate filing based on COVID19?

Where we were in March

US coronavirus cases now at 437

There are 437 cases of coronavirus in the United States, according to the US Centers for Disease Control and Prevention, as well as state and local governments.

There are 49 cases from repatriated citizens from Wuhan (2) and the Diamond Princess (46), according to the CDC. Twenty-one, meanwhile, are from the Grand Princess cruise ship being held off California.

According to CNN Health's tally of US cases that are detected and tested in the United States through US public health systems, 387 cases are in 30 states, bringing the total of coronavirus cases to 437.

This includes presumptive positive cases that tested positive in a public health lab and are pending confirmation from the CDC, and confirmed cases that have received positive results from the CDC.

<https://www.cnn.com/asia/live-news/coronavirus-outbreak-03-07-20-intl-hnk/index.html>

Do we really have to wait 30 days?

Today

Last updated on May 20, 2020	
TOTAL CASES	TOTAL DEATHS
1,528,235	91,664
23,405 New Cases*	1,324 New Deaths*

*Compared to yesterday's data [About the Data](#)

Do we really have to wait 30 days?

Under normal circumstances, the built-in 30-day exception to the statutory exhaustion requirement functions as “an accelerant to judicial review,” providing defendants with recourse to the courts after the lapse of an otherwise “exceptionally quick” 30-day period. ... However, we are not currently living under normal circumstances. Indeed, over the course of 30 days in New York State, the number of diagnosed cases of COVID-19 has grown from only a handful to well over 100,000. Under such circumstances, 30 days is anything but “exceptionally quick”—indeed, each day, perhaps each hour, that elapses “threatens incarcerated defendants with greater peril.” Requiring defendants to await the lapse of the full 30 days from receipt of their requests by the wardens of their facilities may “pervert congressional intent” by transforming the 30-day rule into an obstacle—rather than an accelerant—to judicial review ... and result in irreparable harm to defendants.

US v. Trevon Gross, No. 15-CR-769 (AJN), 2020 WL 1673244, at *3 (S.D.N.Y. Apr. 6, 2020) (citations omitted)

Do we really have to wait 30 days?

Some courts, including the Eastern District of Tennessee, say yes that the passage of 30 days is what gives them jurisdiction.

Section 3582(c)(1)(A) does not identify any exceptions to its exhaustion requirements. Accordingly, this Court and several others have found that the federal courts may not waive its administrative exhaustion requirements.

US v. Bobbie Johnson, No. CR RDB-14-0441, 2020 WL 1663360, at *5 (D. Md. Apr. 3, 2020)

Do we really have to wait 30 days?

Some courts say maybe not:

The Court holds that Perez's undisputed fragile health, combined with the high risk of contracting COVID-19 in the MDC, justifies waiver of the exhaustion requirement.

US v. Perez, No. 17 CR. 513-3 (AT), 2020 WL 1546422 (S.D.N.Y. Apr. 1, 2020)

Do we really have to wait 30 days?

Can we claim emergency?
Can we claim futility?



Exhaustion Exceptions

Most likely to succeed when . . .

Short-timers: "Thus, in light of the urgency of Defendant's request, the likelihood that she cannot exhaust her administrative appeals during her remaining eleven days of imprisonment, and the potential for serious health consequences, the Court waives the exhaustion requirement of Section 3582(c)(1)(A)."

US v. Colvin, No. 3:19CR179 (JBA), 2020 WL 1613943, at *2 (D. Conn. Apr. 2, 2020)

Exhaustion Exceptions

Most likely to succeed when . . .

Not in BOP Facility: "The Bureau of Prisons communicated that because Defendant was not yet in a designated facility, there was no one able to process her request. The Bureau of Prisons' employee indicated that the exhaustion of administrative appeals process was no[t] applicable or possible and suggested contacting the sentencing Court for relief."

US v. Teresa Ann Gonzalez, No. 2:18-CR-0232-TOR-15, 2020 WL 1536155 (E.D. Wash. Mar. 31, 2020)

Exhaustion Exceptions

Most likely to succeed when . . .

Not in BOP Facility: Defendant "is essentially caught in a 'Catch-22'" because "neither the warden at Wyatt [non-BOP facility] nor the BoP will consider his request because of his designation to Wyatt, a non-BoP facility."

United States v. Jepsen, No. 3:19-CV-73 (VLB), 2020 WL 1640232, *3 (D. Conn. Apr. 1, 2020)

Exhaustion Exceptions

Most likely to succeed when . . .

You work all the angles: "Defendant is 55-years-old, suffers from several respiratory problems (including sleep apnea and asthma), and has only 3 months remaining on his 262-month sentence." (Mot. at 1.) The government does not oppose the relief sought. In addition, the Court finds that requiring defendant to first seek relief through the Bureau of Prisons' administrative process would be futile because defendant has an open misdemeanor case in Superior Court which the Bureau of Prisons has advised defense counsel renders defendant ineligible for home confinement.

United States v. Samuel H. Powell, No. 1:94-cr-00316 (ESH) (D.D.C. Mar. 28, 2020).

Exhaustion Mantras

Mantra One: You don't need to win exhaustion, you just need to survive, exhaustion.

Mantra Two: Take the first off ramp.

STEP 2: GROUNDS FOR RELIEF (*see slide 10)

- Terminally ill
- Debilitated (self care abilities)
- Combination of age & sentence served
- Family circumstances
- Other

"Extraordinary and compelling circumstances"



Guidelines criteria ≠ BOP criteria

“Extraordinary and compelling circumstances”

3582(c)(1)(A) requires that release be “consistent with applicable policy statements issued by the Sentencing Commission”

§ 181.13 - REDUCTION IN TERM OF IMPRISONMENT UNDER 18 U.S.C. § 3582(C)(1)(A) (POLICY STATEMENT)

Upon motion of the Director of the Bureau of Prisons under 18 U.S.C. § 3582(C)(1)(A), the court may reduce a term of imprisonment (and may impose a term of supervised release with or without conditions that does not exceed the unexpired portion of the original term of

“Extraordinary and compelling circumstances”

2. Foreseeability of Extraordinary and Compelling Reasons.—For purposes of this policy statement, an extraordinary and compelling reason need not have been unforeseen at the time of sentencing in order to warrant a reduction in the term of imprisonment. Therefore, the fact that an extraordinary and compelling reason reasonably could have been known or anticipated by the sentencing court does not preclude consideration for a reduction under this policy statement.

“Extraordinary and compelling circumstances”

(D) Other Reasons.—As determined by the Director of the Bureau of Prisons, there exists in the defendant’s case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).

Other courts have concluded that the Commission's failure to amend Guideline § 1B1.13 and related Commentary following the First Step Act does not preclude a court from acting on motions for sentence reductions or using the catch-all provision in Application Note 1(D). See *Brown*, 2019 WL 4942051, at *3-4 (citing *United States v. Beck*, No. 1:13-CR-186-6, 2019 WL 2716505, at *5 (M.D.N.C. June 28, 2019); *United States v. Cantu*, No. 1:05-CR-458-1, 2019 WL 2498923, at *5 (S.D. Tex. June 17, 2019); *United States v. Fox*, No. 2:14-CR-03-DBH, 2019 WL 3046086, at *3 (D. Me. July 11, 2019)).

This Court infers that the Commission would apply the same criteria, including the catch-all provision of Application Note 1(D), in the wake of the First Step Act's amendment to § 3582(c)(1)(A), and that this Court may use Application Note 1(D) as a basis for finding extraordinary and compelling reasons to reduce a sentence. Accordingly, this Court's contemplation of a reduction in Urkevich's sentences on Counts III and V is consistent with the Commission's policy statements.

STEP 3: What do we need to tee up for filing?



1. Gather medical records

- Does client have medical records? Can your client ask for a copy of his medical records? Obtain an email from your client authorizing you to obtain his medical records.
- Was client recently enough on the outside that family has records?
- Ask client to fill out a certification of identity (COI), which allows BOP to release medical records to you
 - COI form: <https://www.bop.gov/foia/DOJ361.pdf>

More on medical records

- Send COI along with minimum requests you need (to increase speed) to FOIA; at the same time, ask regional counsel to expedite, or send directly to regional counsel and ask them to fulfill. Limit the number of records you request: If all you need is a medical diagnosis and prescription list, ask for that. Or, ask for three months of records. Or one year.
- Do the best you can with the time and resources you have.

Dealing with the BOP

- Terminally Ill or Debilitated. If client is seeking compassionate release because he is terminally ill or debilitated, as the BOP defines those conditions in BOP PS 5050.50.
- a. Records request may be made by email to regional counsel.
 - 1) BOP Contact Info
 - 2) FAMM Memo (4-29-2020) sets forth details on what to include with/attach to email.
- b. If no response within "reasonable period of time," forward above email to BOP General Counsel at: BOP-OGC/ExecAssistant-@BOP.gov (See FAMM Memo (4-29-2020))
- c. If this does not work, contact Mary Price, mprice@famm.org, who will try to run interference.

Dealing with BOP in cases where client is not debilitated or terminally ill

- Official position is that facility and/or regional counsel cannot give you medical records in other compassionate release cases outside the FOIA process
- a. The BOP-approved procedure for these cases is to first submit a FOIA request 1) See FAMM Memo (4-29-2020)
 - a) BOP FOIA website: <https://www.bop.gov/foia/#tabs-5>
 - b) Use e-mail: ogc_foia@bop.gov, not online request form
- b. Also, just ask BOP and say is for compassionate release
- c. Ask USAO if they have them

2. Plot your § 3553(a) pitch

The district court has to conduct a proper § 3553(a) analysis

- Nature of the offense
 - Is it something that looks different now than it did decades ago? (E.g., stacked 924(c)s, marijuana or crack prosecutions)
- History and characteristics—full current picture, including medical condition, post-sentencing rehabilitation efforts, discipline history
- Need to deter, punish, protect the public
 - Does client's age/current medical situation affect their ability to commit crimes?
 - Does client's psychological state prevent them from being deterred or understanding purpose of punishment?
 - Have they already been punished significantly, including by having to "suffer" BOP taking care of medical needs?
- Need to provide...medical care...in the most effective manner—is that really the BOP right now?

3. Proposed Release Plan

- Where inmate will reside ?
- How he will support himself/herself?
- If the basis for release involves health, how inmate will receive medical treatment and pay for treatment?

Proposed Release Plans

- Talk to family and friends
- Help connect families to medical resources
- Eligibility for SSI? SSA? VA?
- At FDSET, ask for assistance from investigators

Nail down release planning info

- Concrete living situation (E.g., Yvette's daughter lives in a condo. They have an extra bedroom and are willing to allow Yvette to live there long term.)
- Concrete home care situation that addresses basis for relief (E.g., Ed's daughter works from home and can make sure he receives his three times a day medications.)
- Concrete medical situation. (E.g., Paul's brother lives five minutes from Loma Linda Medical Complex, and Paul has investigated how to enroll his brother in Medicare and Medi-Cal.)
- Concrete support situation. (E.g., Yvette's daughter is willing to support her until she is able to find a job. Paul's brother is a retiree and has sufficient funds to provide his brother's material needs.)

We can all move the ball forward

- If clients call you, give them information about exhaustion. Get that ball rolling.
- If you have means of identifying former clients who fall under the CDC's criteria, and you're in contact with them, or family, reach out proactively to provide info.
- If you have bandwidth to file motions, please check fd.org's COVID-19 webpages and use FD_CoronavirusList@fd.org as a forum for help.
- If you're doing CR motions in your FD office and want to loop into the FD community, contact Davina_Chen@fd.org

SUMMARY

- Contact family member
- Write client and include Certificate of Identity
- Gather and review medical records
- Draft motion
- Contact Probation Officer
- Send to attorney for review (Interns)
- File motion requesting that file under seal with proposed motion
- Send sealed document to AUSA

Resources

Federal Defender, D. Oregon

<https://or.fد.org/content/compassionate-release-basics>

Sentencing Resource Counsel

<https://www.fد.org/coronavirus-disease-2019-covid-19>

If you do not have an fد.org email address, but want access to the SRC box, please email Davina_Chen@fد.org and request access to the box folder "CR in the Age of COVID19"

FAMM

<https://famم.org/covidresponse/>
