

A prisoner's dilemma: COVID-19 and motions for compassionate release

By Joe D. Whitley, Esq., Thomas H. Barnard, Esq., Brett Switzer, Esq., and Laura E. Collins Esq., *Baker Donelson*

MAY 28, 2020

In the wake of COVID-19, motions for “compassionate release” under U.S.C.A. 18 § 3582(c) have become pressing issues for prosecutors, defense counsel, federal judges and a federal prison system that, like the rest of the world, has been caught unprepared.

Since President Donald Trump declared a national emergency March 13, federal courts have issued hundreds of decisions on these motions. And with more than 177,000 Bureau of Prisons inmates, more motions and rulings are coming.

As of April 22, 566 federal inmates and 342 BOP staff members had tested positive for COVID-19.¹ Notably, these are only confirmed cases. BOP has admitted that these numbers are most likely an undercount; it only reports confirmed cases and does not have enough tests.²

Comparatively, BOP reports only 248 inmates and 52 BOP staff have recovered, and 24 federal inmates have died. Numbers increase daily.

Like their state and local counterparts, some federal correctional institutions, including FCI Otisville in New York, are taking drastic measures, illustrating the exigency of the situation. “Most recently, the population of FCI Otisville camp (111) inmates was sent to quarantine in preparation for release to home confinement.”³

At FCI Oakdale in Louisiana, “correctional officers were told to stop testing people and just assume anyone with symptoms had been infected.”⁴ The unsafe conditions and lack of preparedness are well documented in BOP’s overcrowded facilities, and experts say that “absent swift action, we will see devastation that is unbelievable.”⁵

In this climate, federal prisoners are considering ways to protect themselves from the deadly disease, and many are filing motions for “compassionate release.”

THE LEGAL STANDARD UNDER 18 U.S.C.A. § 3582(C)

For decades, the compassionate release provision of 18 U.S.C.A. § 3582(c) was rarely invoked, and release thereunder was even more rarely granted. Before 2018, only the BOP director could file these “compassionate-release motions.”⁶

In 2018, though, the First Step Act removed the BOP’s gatekeeper role and authorized criminal defendants to petition courts directly.⁷

The statute, 18 U.S.C.A. § 3582(C)(1)(A)(i), provides:

(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;

and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

These changes paved the way for criminal defendants to seek compassionate release for “extraordinary and compelling reasons” under this catchall provision of the modified statute.

THE EXHAUSTION REQUIREMENT UNDER 18 U.S.C.A. § 3582(C)

The statute’s language requires that a defendant “has fully exhausted all administrative rights to appeal failure of the Bureau of Prisons to bring a motion on the defendant’s behalf,” or that 30 days have elapsed “from the receipt of such a request by the warden of the defendant’s facility,” whichever is earlier.

This is known as the exhaustion requirement, and courts differ as to what exhaustion means or if it is required.⁸ Understandably, many inmates and their counsel fear they cannot wait 30 days to seek compassionate release, considering COVID-19 is highly contagious

and deadly. Therefore, several arguments have emerged as to how to confront the exhaustion issue.

First, the statutory notice requirement was satisfied by President Trump's declaration of a national emergency on March 13.⁹

Second, the exhaustion requirement can be waived because it is a claim-processing rule as opposed to a jurisdictional precondition.¹⁰

Third, where exhaustion is futile, it may be waived at the court's discretion. Under this theory, defendants argue — and courts have held — that the exhaustion requirement is not absolute and that the district court has the discretion to waive it under certain circumstances, just as it can in other litigation.¹¹

Fourth, Section 3582(c)'s language does not mandate exhaustion. Instead, it allows for direct filing by a defendant upon expiration of a 30-day period following a request to a warden, regardless of progress on administrative procedures.

In other words, the statute does not make exhaustion a mandatory prerequisite to filing.¹²

THE SENTENCING COMMISSION MUST UPDATE SECTION 3582(C)'S POLICY STATEMENT

After dealing with the exhaustion issue, courts vary on how they interpret their authority under the statute.

Understandably, many inmates and their counsel fear they cannot wait 30 days to seek compassionate release, considering COVID-19 is highly contagious and deadly.

Despite the broad and plain language of the “extraordinary and compelling” catchall provision and the clear jurisdiction and authority of the courts, a minority view has emerged under which courts are misinterpreting outdated United States Sentencing Commission policy guidance issued before the First Step Act was enacted.

This minority of courts present a watered-down statutory analysis, repudiating their authority to grant relief under the “extraordinary and compelling circumstances” prong and effectively rendering the 2018 amendments void.¹³

This problem arises because the statute (as amended in 2018) still instructs the courts to rely on the Sentencing Commission's Section 3582(c) policy statement. But the Sentencing Commission has not updated that statement since the FSA was enacted in 2018 to address the catchall provision.

The policy statement still assumes the BOP plays the role of gatekeeper to requests for compassionate release. In other

words, existing guidance does not contemplate a direct remedy inuring to defendants because the direct remedy did not exist when the policy statement was written. Therefore, this guidance should not be applied.

Notably, the Sentencing Commission currently lacks a quorum and is thus presently unable to issue new guidance. However, the minority view flies in the face of the clear intent and purpose of the FSA, which sought to expand compassionate release and expedite applications, and is therefore incorrect.¹⁴

The majority view is compelling. Of course, the Sentencing Commission's old policy statements remain informative, but district courts are not limited to the express grounds for compassionate release contained in the outdated policy statements:

As one court has noted:

There is no policy statement applicable to motions for compassionate release filed by defendants under the First Step Act. By its terms, the old policy statement applies to motions for compassionate release filed by the BOP director and makes no mention of motions filed by defendants ...

The Sentencing Commission has not amended or updated the old policy statement since the First Step Act was enacted ... nor has it adopted a new policy statement applicable to motions filed by defendants.¹⁵

Ultimately, the Sentencing Commission should be expected to provide updated policy guidance. Until then, though, practitioners must educate their sentencing courts on the gap left by existing guidance.

OTHER FACTORS THE COURT MUST CONSIDER

The existing policy statement, which provides some useful guidance not nullified by recent amendments, requires a court to consider the factors set forth at 18 U.S.C.A. § 3142(g) (pretrial detention factors) and 18 U.S.C.A. § 3553(a) (sentencing factors) in conjunction with compassionate release requests.¹⁶

A defendant, therefore, must establish that he is not a danger to the safety of any other person or to the community and that the factors in Sections 3553(a)(1), (a)(2)(A)-(D) and (a)(6) warrant relief.

Of course, on top of this, the defendant must establish “extraordinary and compelling” circumstances, which are discussed below.

COMPASSIONATE RELEASE IN DIFFERENT CONTEXTS

The Justice Department recognizes the vulnerability of federal prisoners.

Attorney General William Barr has issued three memoranda: The first encourages BOP to transfer inmates to home confinement where appropriate¹⁷; the second emphasizes the need for prompt BOP action¹⁸; and the third mandates that all prosecutors consider individuals' medical risks during the pandemic.¹⁹

While the message of the memos is clear (i.e., prioritize home confinement), they leave much to the discretion of their recipients (BOP and federal prosecutors), and many critics point out that they may hurt — not help — inmates seeking compassionate release.²⁰

COVID-19 does not stop to ask who you
are, what crime you have committed,
how long you have left on your sentence,
or what preexisting medical conditions
you have.

The intended message is loud and clear — i.e., time is of the essence, BOP is dragging its feet, and this is an important situation requiring the urgent attention of the BOP and federal prosecutors everywhere.

Nonetheless, prosecutors continue to assure courts that the situation is under control, and BOP has only placed an additional 1,280 inmates into home confinement.

So, what about the rest of the 177,000+ inmates in BOP custody? For them, a motion for compassionate release may be their only recourse.

THOUGHTS AND LESSONS

If you or a client is considering a motion under Section 3582, go ahead and file a request for release, Form BP-229(13), with the appropriate warden to start the clock on exhaustion.

Most motions are filed before expiration of the 30-day waiting period, given the present extraordinary circumstances, but this is generally not a problem. The waiting period is not jurisdictional, judges have discretion to waive it, and we have not seen any jurisprudence suggesting that submission of the form constitutes waiver of any legal arguments discussed above.

Successful movants generally have the facts on their side. That is, these movants are generally within a few weeks or months of release, suffer from qualifying medical conditions that would be exacerbated by COVID-19, and/or they are elderly.

In other words, successful movants thus far have met the traditional "compassionate release" criteria set forth at U.S.S.G. § 1B1.13, even if a court cites its authority under the broader catchall provision.

Conversely, no court has considered that COVID-19 does not stop to ask who you are, what crime you have committed, how long you have left on your sentence, or what preexisting medical conditions you have.

Whether a prisoner is released depends on a host of influences, including the judge who sentenced them, the warden over the facility where they are held, and the prosecutors. It involves politics, geographic influence and aspects of complete randomness beyond the prisoner's control.

Compassionate release is an extraordinary form of relief, and a court being asked to consider it will wonder: "What makes this case different from every other case?" A movant cannot rely on a simple, generalized assertion of risk due to COVID-19, but rather should be prepared to establish a particularized risk, such as medical vulnerability to COVID-19 and dangers and inadequacies at their particular BOP facility.

Remember, neither COVID-19 nor the underlying medical condition alone is enough to warrant relief. But together, they may present "extraordinary and compelling" circumstances warranting compassionate release.

Notes

¹ Federal Bureau of Prisons, COVID-19 Cases, BOP, <https://bit.ly/3aETrel> (last accessed April 23, 2020).

² Newsletter to Federal Prisoners, Internal Memo Toughens Cares Act Home Confinement Standards (April 20, 2020), <https://bit.ly/35k4cSA> (last accessed April 21, 2020).

³ *Id.*

⁴ *Id.*

⁵ Letter from David Patton et al., Co-Chairs of the Federal Public & Community Defenders Legislative Committee, to Hon. William P. Barr, Atty. Gen. 3 (April 1, 2020), <https://bit.ly/2yLt9dl> (last accessed April 21, 2020) (punctuation omitted).

⁶ *United States v. Brown*, 411 F. Supp. 3d 446 (S.D. Iowa 2019).

⁷ *United States v. Redd*, No. 1:97-cr-00006-AJT, 2020 WL 1248493 (E.D. Va. Mar. 16, 2020); 164 Cong. Rec. S7314-02, 2018 WL 6350790 (Dec. 5, 2018) (statement of Sen. Cardin, co-sponsor of the FSA) ("[T]he bill expands compassionate release ... and expedites compassionate release applications.").

⁸ See, e.g., *United States v. Perez*, No. 17-cr-513-3 (AT), 2020 WL 1546422 (S.D.N.Y. Apr. 1, 2020) (allowing waiver of exhaustion requirement); *United States v. Zuckerman*, No. 16-cr-194 (AT), 2020 WL 1659880 (S.D.N.Y. Apr. 3, 2020) (same); *United States v. Colvin*, No. 19-cr-179 (JBA), 2020 WL 1613943 (D. Conn. Apr. 2, 2020) (same). Cf. *United States v. Roberts*, No. 18-cr-528 (JMF), ECF No. 296 (S.D.N.Y. Apr. 8, 2020) (strictly enforcing exhaustion requirement); *United States v. Villanueva*, No. 18-cr-472-3 (KPF), ECF No. 85 (S.D.N.Y. Apr. 8, 2020) (same); *United States v. Hernandez*, No. 18-cr-834 (PAE), 2020 WL 1445851 (S.D.N.Y. Mar. 25, 2020) (same); *United States v. Raia*, No. 20-1033, 2020 WL 1647922 (3d Cir. Apr. 2, 2020) (same).

⁹ See, e.g., *United States v. Perez*, No. 17-cr-513-AT, ECF No. 92 (S.D.N.Y. Apr. 1, 2020); see also *United States v. Perez*, 2020 WL 1546422 (allowing waiver of administrative exhaustion on other grounds).

¹⁰ See *United States v. Brown*, No. 18-cr-56-jdp, ECF No. 59 (W.D. Wis. Apr. 8, 2020) (citing *Bowles v. Russell*, 551 U.S. 205 (2007) (noting "the jurisdictional distinction between court-promulgated rules and limits

enacted by Congress"); *Fort Bend Cty., Texas v. Davis*, 139 S. Ct. 1843 (2019) ("The Court has ... stressed the distinction between jurisdictional prescriptions and non-jurisdictional claim-processing rules, which seek to promote the orderly progress of litigation..."); *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13 (2017).

¹¹ See *Perez*, No. 17-cr-513-AT, ECF No. 92 (S.D.N.Y. Apr. 1, 2020) (citing *Washington v. Barr*, 925 F.3d 109 (2d Cir. 2019) (explaining a three-factor test) (citing *McCarthy v. Madigan*, 503 U.S. 140, (1992)).

¹² *United States v. Gonzalez*, No. 18-CR-0232-TOR-15, ECF No. 829 (E.D. Wash. Mar. 25, 2020); see also *United States v. Gonzalez*, No. 18-CR-0232-TOR-15, 2020 WL 1536155 (E.D. Wash. Mar. 31, 2020) (finding prisoner had exhausted her remedies on a prior occasion several months before, which would satisfy current motion and order of release).

¹³ See, e.g., *United States v. Willingham*, No. CR113-010, 2019 WL 6733028, (S.D. Ga. Dec. 10, 2019); *United States v. Lynn*, No. 89-0072-WS, 2019 WL 3805349 (S.D. Ala. Aug. 12, 2019).

¹⁴ Hearing on Compassionate Release and the Conditions of Supervision Before the U.S. Sentencing Comm'n (2016) (statement of Michael E. Horowitz, Inspector General, Dep't of Justice); see also note 7, *supra*.

¹⁵ *United States v. Beck*, 425 F. Supp. 3d 573 (M.D.N.C. 2019) (citations omitted); see also *Brown*, 411 F. Supp. at 448; *United States v. Fox*, No. 14-cr-03-DBH, 2019 WL 3046086 (D. Me. July 11, 2019); *Redd*, 2020 WL 1248493; *United States v. Young*, No. 2:00-cr-00002-1, 2020 WL 1047815 (M.D. Tenn. Mar. 4, 2020); *United States v. Maumau*, No. 08-cr-00785, 2020 WL 806121 (Feb. 18, 2020).

¹⁶ U.S.S.C. § 1B1.13(2).

¹⁷ Memo from AG William Barr to Director of BOP, Prioritization of Home Confinement As Appropriate in Response to COVID-19 Pandemic, Dept. of Justice (Mar. 26, 2020), <https://bit.ly/2SbQhZz>.

¹⁸ Memo from AG William Barr to Director of BOP, Increasing Use of Home Confinement at Institutions Most Affected by COVID-19 (April 3, 2020), <https://politi.co/3bJHoOj>.

¹⁹ Memo from AG William Barr to Prosecutors, Litigating Pre-Trial Detention Issues During the COVID-19 Pandemic (Apr. 6, 2020), <https://bit.ly/35dTj4z>.

²⁰ See e.g., Letter from David Patton et al., Co-Chairs of the Federal Public & Community Defenders Legislative Committee, to Hon. William P. Barr, Atty. Gen. 3 (Apr. 1, 2020), <https://bit.ly/2yJvyFA>; Brennan Center for Justice at NYU School of Law Center for American Progress, Expanding BOP's Response to the Novel Coronavirus, and Helping States Safely Reduce their Prison Populations (April 16, 2020), <https://bit.ly/3eYiLiX>; Legal Information Services Associates, LLC, Newsletter to Federal Prisoners (dated April 20, 2020), <https://bit.ly/2YaXYmy>.

This article appeared on the Westlaw Practitioner Insights Commentaries web page on May 28, 2020.

ABOUT THE AUTHORS



(L-R) **Joe D. Whitley** is a shareholder in the Atlanta and Washington offices of **Baker Donelson** and chairs the firm's Government Enforcement and Investigations group. He represents clients in white-collar criminal matters, regulatory enforcement and corporate internal investigations. Before joining the firm, he held several positions in the U.S. Justice Department, including acting associate attorney general. He can be reached at jwhitley@bakerdonelson.com. **Thomas H. Barnard** is a shareholder in the firm's Baltimore office and is vice chair of the Government Enforcement and Investigations group. A former assistant U.S. attorney, military prosecutor and military defense counsel with more than 20 years of government experience, he can be reached at tbarnard@bakerdonelson.com. **Brett Switzer** is an associate in the firm's Atlanta office. He focuses his practice in government enforcement and investigations and can be reached at bswitzer@bakerdonelson.com. **Laura E. Collins** is an associate in the firm's Baltimore office. In her diversified litigation practice with both local and national clients, she represents individuals and entities in civil actions, government investigations and white-collar criminal matters. She can be reached at lcollins@bakerdonelson.com. This article reflects the situation at the time it was written based on the rapidly changing nature of the COVID-19 pandemic.

Thomson Reuters develops and delivers intelligent information and solutions for professionals, connecting and empowering global markets. We enable professionals to make the decisions that matter most, all powered by the world's most trusted news organization.

© 2020 Thomson Reuters. This publication was created to provide you with accurate and authoritative information concerning the subject matter covered, however it may not necessarily have been prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional. For subscription information, please visit legalsolutions.thomsonreuters.com.