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COVID-19

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The State of Compassionate Release

Alan Ellis and
Mark H. Allenbaugh

This article reviews the current state of play in the quickly developing law of federal compassionate release. Compassionate release is one of the few grounds a federal judge can reduce a previously imposed sentence to time served. Considering the on-going pandemic, it is being sought at a record pace. We discuss some of the major issues litigators should be aware of when moving courts for compassionate release.

A Brief History of Compassionate Release

At the federal level, once a sentence is imposed, a federal judge has very limited authority to re-address the sentence absent a remand by an appellate court.¹

Pursuant to 18 U.S.C. § 3582(c)(1)(A), however, after “considering the factors set forth in section 3553(a),” a judge may “reduce [an inmate’s] 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)” where (1) “extraordinary and compelling reasons warrant [release],” (2) “the defendant is not a danger to the safety of any other person or the community,” and (3) “such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.” This is known as “compassionate release” and has been available since the mid-1970s.² In other words, a

judge can reduce an inmate’s sentence to time-served plus supervised release. We have found it useful to suggest that the Court make home confinement for a period of time as a condition of supervised release.

Until relatively recently, only the Director of the Bureau of Prisons (BOP) could move the sentencing judge for compassionate release. Not surprisingly, this occurred very rarely, which resulted in exceedingly little development of case law. Indeed, prior to this year, there were a total of only 740 federal cases nationwide even mentioning “compassionate release” according to a search of Lexis-Nexis.³ Accordingly, in 2016, the U.S. Sentencing Commission held hearings on compassionate release and concluded it was not being sought frequently enough, and that the Commission ought to encourage wardens to more frequently move for compassionate release.

The Commission has conducted an in-depth review of this topic, including consideration of Bureau of Prisons data documenting lengthy review of compassionate release applications and low approval rates, as well as two reports issued by the Department of Justice Office of the Inspector General that are critical of the Bureau of Prisons’ implementation of its compassionate release program. See U.S. Department of Justice, Office of the Inspector General, *The*

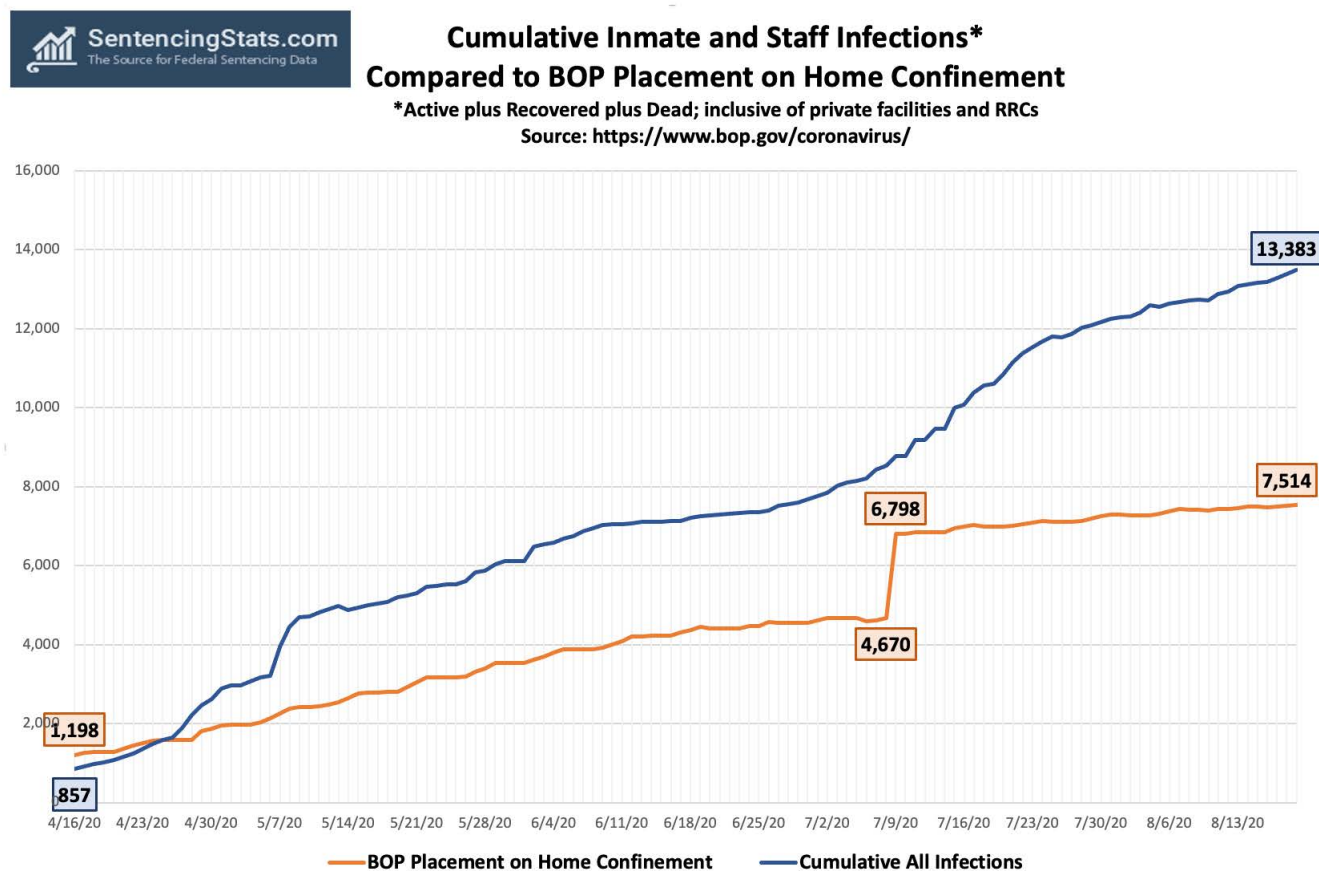
Federal Bureau of Prisons' Compassionate Release Program, I-2013-006 (April 2013); U.S. Department of Justice, Office of the Inspector General, *The Impact of the Aging Inmate Population on the Federal Bureau of Prisons*, E-15-05 (May 2015). In February 2016, the Commission held a public hearing on compassionate release and received testimony from witnesses and experts about the need to broaden the criteria for eligibility, to add guidance to the medical criteria, and to remove other administrative hurdles that limit the availability of compassionate release for otherwise eligible defendants.⁴

Then, on December 21, 2018, via the First Step Act, inmates were given the authority to seek compassionate release on their own (or through a third party, e.g., their attorney)⁵ from the judge who originally imposed sentence, but only after either exhausting administrative remedies or "the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier."⁶ (As we discuss in the next section, however, what it means to exhaust administrative remedies is not uniformly clear).

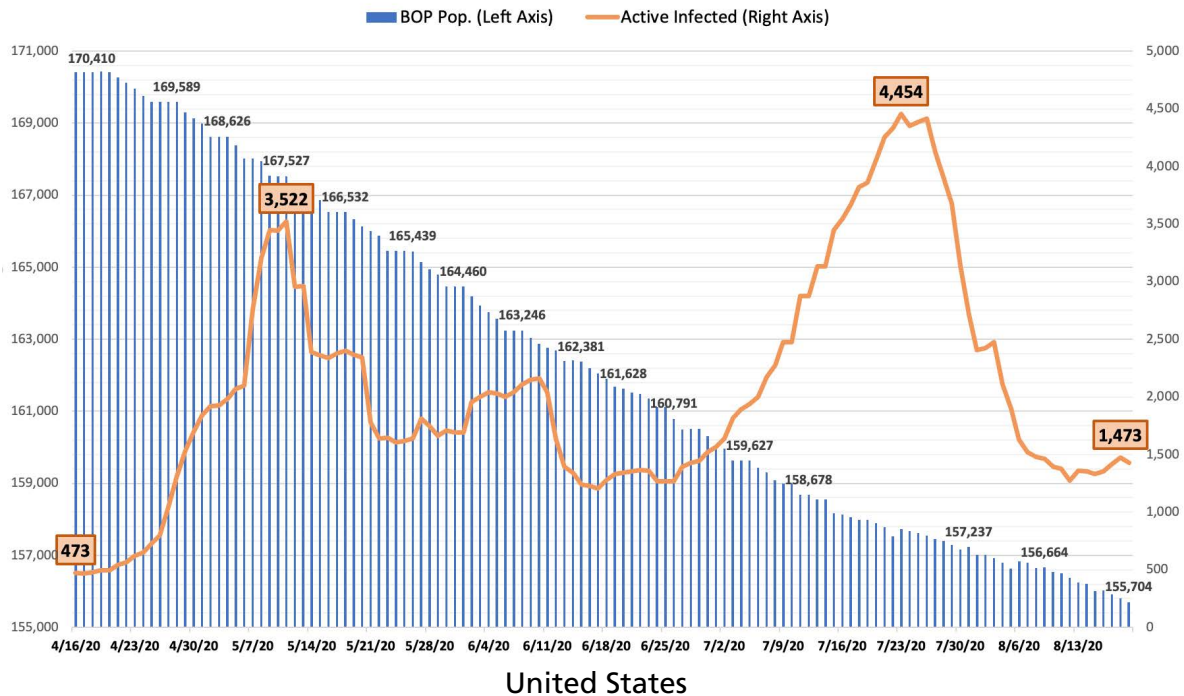
And then, the pandemic hit. Since March 13, 2020, when a national emergency was declared,⁷ Lexis-Nexis now identifies nearly 4,000 cases referencing "compassionate release" together with "COVID-19," "coronavirus," or "pandemic" as of August 2020.

The Pandemic

Federal inmates and their loved ones, of course, are understandably concerned about their health and general welfare as the virus rages not just throughout this country, but through BOP institutions. As of August 8, 2020, there were over five million persons in the United States alone confirmed infected with SARS-CoV-2, the virus that causes COVID-19.⁸ This has resulted in at least 160,000 deaths so far.⁹ Also as of August 18, 2020, the BOP reports that at least 13,383 inmates and staff have been confirmed infected with the virus despite having also placed 7,514 inmates on home confinement.¹⁰ As the first chart below illustrates, despite the increasing number of inmates placed on home confinement, it still is not quick enough to off-set the spread of the virus.

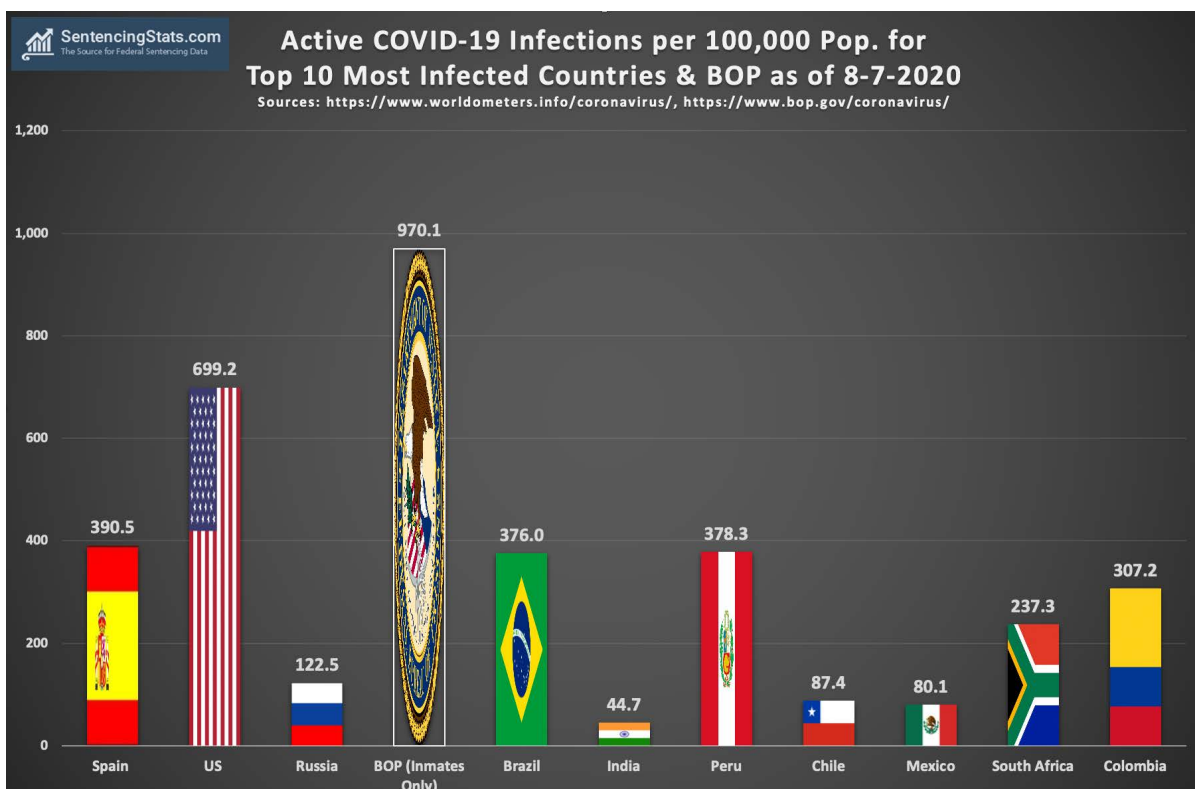


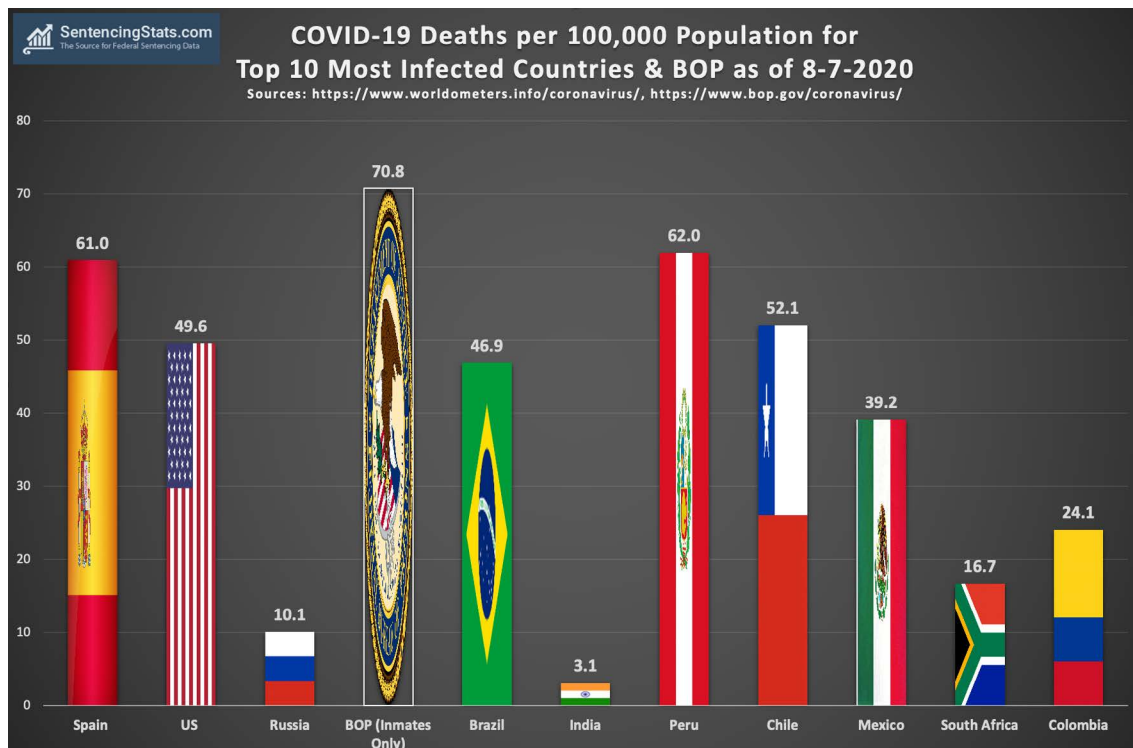
**Comparison of Daily Inmate Population
(BOP Institutions, Private Prisons, and RRCs Combined)
to Daily Active Infected Inmates**
Source: www.bop.gov/coronavirus



Likewise, the second chart above illustrates that despite the dramatic decrease in the overall inmate population in BOP institutions, privately managed institutions and residential re-entry centers (“RRCs”), there still are more active cases than there were in April. In fact, as illustrated, there have been two major outbreaks. Since the BOP does not provide any definition of its methods for determining when staff or inmates have recovered, the active infections likely are far higher than are being reported.

On a per capita basis, if the BOP was a country, it would have the most active infections per 100,000 population than any of the top ten most infected countries on earth, which, of course, includes the United States (see below).





Just as troublingly, if again the BOP was a country, it would have the most deaths from COVID-19 per 100,000 population than any of the top ten most infected countries on earth (see chart above).

While the BOP may be doing all it can to address the pandemic and protect inmates, it simply is a futile exercise if the number of inmates is not dramatically reduced and quickly. It therefore is incredibly troubling that this far into the pandemic, there are 99 of the 204 BOP institutions, including privately managed facilities, that still are over their rated capacities as of August 6, 2020.¹²

Compassionate Release—The Mechanics

Step One is for the inmate or someone on his or her behalf¹³ to request compassionate release of the warden at the institution in which he is incarcerated. If done by the inmate, this generally is done in writing via a “cop-out” (a BOP form called an Informal Request to Staff Member). Importantly, the inmate must use the magic words “compassionate release.” If the Warden, upon an investigation of the request determines that the request warrants approval, the Warden shall refer the matter in writing with recommendation to the Office of General Counsel. Program Statement 5050.50 §571.82.

Step Two is where it gets tricky. The statute requires 30 days to lapse from the time the inmate first requests compassionate release of his warden before filing a motion for the same directly with the sentencing judge. Early in the pandemic, inmates were either skipping Step One altogether, or not waiting the full 30 days prior to filing the motion and, while a

few inmates were successful, the bulk were not, and the case law now appears to recognize no exceptions to Step One.

The question becomes “What does ‘lapse’ mean?” Obviously, if an inmate requests compassionate release of a warden, and the warden does not respond within 30 days, then an inmate may then move his sentencing judge for compassionate release. The case law is uniform on this uncontroversial point. But what if the warden responds within 30 days and denies the inmate’s request? Some courts have held that it does not matter. Once 30 days have elapsed, an inmate is free to seek relief from his sentencing judge, period.

But a few district courts within the Third Circuit have held that a denial requires the inmate to exhaust his administrative appeals through the BOP bureaucracy,¹⁴ which can take months.

An inmate who is not satisfied with the Warden’s response may submit an Appeal on the appropriate form (BP-10) to the appropriate Regional Director within 20 calendar days of the date the Warden signed the response. An inmate who is not satisfied with the Regional Director’s response may submit an Appeal on the appropriate form (BP-11) to the General Counsel within 30 calendar days of the date the Regional Director signed the response. . . . Appeal to the General Counsel is the final administrative appeal.¹⁵

At least one district court within the Third Circuit have held that an inmate can move for compassionate release only after these appeals have been exhausted. However, this interpretation reads into the statute something that is not there, to wit, that a defendant may move for compassionate release upon “the lapse of 30 days from the receipt of such a request by the warden of the defendant’s facility *only if the warden fails to respond*.” There is no controlling authority in the Third Circuit holding such an interpretation.

Indeed, the Third Circuit in *Raia*, supra, did not even address this particular issue or could be fairly read to imply that a warden’s denial of a compassionate release request requires full exhaustion of administrative appeals before a district court may entertain a motion for compassionate release. Moreover, DOJ itself is on record in Middle District of Pennsylvania that “§3582(c)(1)(A)’s exhaustion requirement is satisfied when (as here) a defendant’s request is denied by the warden within 30 days of receipt and 30 days have passed since the warden’s receipt.”¹⁷

At least three other district courts within this Circuit have held that the lapse of 30 days is all that is required before filing a motion for compassionate release in federal court *even where the warden denied the initial request within 30 days*.¹⁸

The only U.S. Circuit Court of Appeals to have directly addressed the issue, as of August 2020, has held that “[p]risoners who seek compassionate release have the option to take their claim to federal court within 30 days, **no matter the appeals available to them**.”¹⁹ Moreover, the 30-day period is not jurisdictional in nature, but rather is a claims-processing rule in any event and therefore is subject to forfeiture or waiver if not properly invoked.²⁰

Step Three is proving to the District Court that there is an “extraordinary and compelling reason”²¹ for the inmate’s release. So far, the mere fact of the pandemic does not appear to be sufficient.²² However, since the pandemic, inmates have not had to allege they are suffering from terminal illness. Rather, simply suffering from an ailment that the CDC has identified as making them more susceptible to COVID-19 has proven sufficient. Importantly, successful applications for compassionate release will include the inmate’s release plan and should also include the inmate’s medical records (under seal, of course) if pertinent. While the vast majority of compassionate release grants have focused on the inmate’s medical history, at least one has cited non-medical reasons, such as favorable changes to intervening case law or the length of imprisonment the inmate already has served.²³

For an example of a successful compassionate release motion filed by one of the authors, see *United States v. Pickard*.²⁴

Conclusion

The current pandemic has brought needed attention to a moribund area of law: compassionate release. It is one of the very few statutory vehicles available for judges to re-address a sentence. For obvious reasons, district courts are becoming overwhelmed with such motions due to the COVID-19 pandemic. Knowing the procedural steps for seeking compassionate release can assist an inmate in having a district judge reach the merits of the request. While those have primarily been medical-based, as the pandemic progresses and, unfortunately, worsens within the BOP, the grounds for compassionate release can and will likely broaden. And broaden quickly they must, for, as of this writing, the BOP is reporting that of the 111 inmate deaths so far,²⁵ four occurred once the inmate was placed on home confinement, suggesting that the remedy did not arrive soon enough. 🙏

NOTES:

¹ “A court generally may not correct or modify a prison sentence once it has been imposed, unless permitted by statute or by Federal Rule of Criminal Procedure 35.” *United States v. Tidwell*, NO. 94-353, 2020 U.S. Dist. LEXIS 139434, *3 (E.D. Pa. Aug. 5, 2020) (citations omitted).

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THE STATE OF COMPASSIONATE RELEASE

ALAN ELLIS AND MARK H. ALLENBAUGH



Notes

¹ “A court generally may not correct or modify a prison sentence once it has been imposed, unless permitted by statute or by Federal Rule of Criminal Procedure 35.” *United States v. Tidwell*, NO. 94-353, 2020 U.S. Dist. LEXIS 139434, *3 (E.D. Pa. Aug. 5, 2020) (citations omitted).

² *See id.* at *4 (“The Compassionate Release Statute was originally enacted as part of the Parole Reorganization Act of 1976’ and, ‘as part of the Comprehensive Crime Control Act of 1984, [Congress] enacted the modern form of the Compassionate Release Statute contained in 18 U.S.C. § 3582.’”) (internal quotation marks and citation omitted).

³ Lexis-Nexis’s database only extends back to January 1, 1990.

⁴ USSG App. C, Amend. 799 (effective Nov. 1, 2016); *see* USSG §1B1.13, comment. (n.4) (“encourage[ing]” the Director to file such motions whenever warranted).

⁵ Program Statement 5050.50 §571(b).

⁶ 18 U.S.C. § 3582(c)(1)(A).

⁷ *See* White House, Proclamation on Declaration National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (Mar. 13, 2020), <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>.

⁸ *See* Worldometer, COVID-19 CORONAVIRUS PANDEMIC, <https://www.worldometers.info/coronavirus/> (last visited Aug. 8, 2020).

⁹ *See id.*

¹⁰ The BOP has independent authority under the CARES Act, Pub. L. 116-136, § 12003, to place inmates on home confinement to serve out the remainder of their sentence. This is separate and distinct from a federal court’s authority to reduce a sentence to time-served and thereby release an inmate from BOP custody via compassionate release. *See United States v. Moore-Brown*, No. 3:17-CR-129, 2020 U.S. Dist. LEXIS 81293, *2 (M.D. Pa. May 8, 2020).

¹¹ The data for the charts in this article are compiled from the BOP. The BOP updates its COVID-19 data on a daily basis at approximately 3:00 p.m. CT. The population counts for each institution are updated by the BOP weekly on Thursdays at midnight CT.

¹² For current institution populations, *see* BOP, *Population Statistics*, https://www.bop.gov/about/statistics/population_statistics.jsp. For rated capacities, *see* Jay Hurst, *Prison Capacities*, http://jayhurst.net/wp-content/uploads/2013/09/16-0216_Capacities_PP80_population_report.pdf.

¹³ BOP Program Statement 5050.05.

¹⁴ *See, e.g., United States v. Grasha*, 2020 U.S. Dist. LEXIS 142401, *15-16 (W.D. Pa. Aug. 10, 2020) (“an inmate may seek relief in court upon demonstrating either: (1) completion of the BOP remedies, or (2) 30 days of forgetfulness or inattention during the administrative review, whichever is earlier”); *United States v. Komoroski*, 2020 U.S. Dist. LEXIS 105779, *8 (M.D. Pa. June 17, 2020) (“[S]ince the Warden timely responded to Komoroski’s March 26, 2020 request on April 21, 2020, Komoroski cannot directly file an appeal with the court without exhausting his administrative remedies. Only if the Warden fails to respond to the inmate’s request within 30 days, can the inmate file his motion for compassionate release with the court without exhausting his BOP administrative remedies.”); *United States v. Early*, 2020 U.S. Dist. LEXIS 89406, *6-7 (W.D. Pa. May 21, 2020) (“Courts have interpreted the statute to mean that an inmate must fully exhaust his administrative remedies unless his or her warden does not respond to the inmate’s request within 30 days.”).

¹⁵ 28 CFR 542.15(a).

¹⁶ *See United States v. Snyder*, No. 4:19-cr-00200, 2020 U.S. Dist. LEXIS 106789, *4-5 (M.D. Pa. June 18, 2020) (Brann, J.) (citing *United States v. Raia*, 954 F.3d 594 (3d Cir. 2020)).

¹⁷ *United States v. Komorski*, No. 3:17-cr-156, 2020 U.S. Dist. LEXIS 105779, * 7 (M.D. Pa. June 17, 2020) (Mannion, J.).

¹⁸ See *United States v. Rengifo*, Civil No. 1:13-CR-00131, 2020 U.S. Dist. LEXIS 129192 (M.D. Pa. July 22, 2020) (court implicitly recognized no need to exhaust beyond 30 days); *United States v. Haynes*, Nos. 3:17-cr-0019, 3:17-cr-0042, 2020 U.S. Dist. LEXIS 125555, *7 (D.V.I. July 16, 2020) (declining to reconsider finding that defendant satisfied exhaustion requirement simply by waiting 30 days to file motion after submitting request to warden and having same denied); *United States v. Somerville*, No. 2:12-CR-225-NR, 2020 U.S. Dist. LEXIS 93935, *11 (W.D. Pa. May 29, 2020) (“Nothing in the statutory text limits the 30-day, fast-track option to circumstances in which the Warden has failed to respond—the clock runs from the Warden’s ‘receipt’ of the request. And nothing requires the prisoner to appeal a denial from the Warden if more than 30 days has elapsed.”).

¹⁹ *United States v. Alam*, 960 F.3d 831, 834 (6th Cir. 2020) (Emphasis added).

²⁰ See *id.* at 833.

²¹ 18 U.S.C. § 3583(c)(1)(a)(i).

²² See, e.g., *United States v. Adigun*, No. 1:11-CR-151, 2020 U.S. Dist. LEXIS 119480, *10 (M.D. Pa. July 8, 2020) (“the mere fact that there are inmates or staff who have tested positive for the COVID-19 virus at a defendant's correctional institution does not rise to the level of ‘extraordinary and compelling’ reasons for early release”).

²³ See *United States v. Richardson*, No. 4:01-CR-00774 (S.D.Tex. 2020).

²⁴ No. 2:11-cr-00449, 2020 U.S. Dist. LEXIS 130578 (E.D. Cal. July 22, 2020).

²⁵ See BOP, COVID-19 Coronavirus, <https://www.bop.gov/coronavirus/>.