

Compassionate Release Grants Needed Now More Than Ever

By **Alan Ellis and Mark Allenbaugh** (February 28, 2024)

"Compassionate release" is the colloquial phrase for a reduction in an incarcerated person's federal sentence.

In this article, we discuss who qualifies for compassionate release, including new developments expanding its availability, and review the mechanics of how a person in federal prison can apply for it.

We close with why, in light of the Federal Bureau of Prisons' dangerously understaffed status, exceedingly low employee morale, inmate overpopulation and crumbling infrastructure, granting compassionate release is desperately needed now more than ever.

What is compassionate release?

Generally speaking, compassionate release occurs when a federal judge reduces an incarcerated person's term of imprisonment that it had previously imposed. Such a reduction could be for just a portion of the remaining time to serve, or all of the remaining time, resulting in immediate release.

Any person incarcerated in federal prison may apply for a reduction in sentence regardless of the length of the sentence originally imposed or offense of conviction. However, they must first establish "extraordinary and compelling" reasons for the reduction.

Since 1984, Congress has directed the U.S. Sentencing Commission to promulgate "general policy statements regarding ... sentencing modification" and "describe what should be considered extraordinary and compelling reasons for sentence reduction."^[1]

Until recently, extraordinary and compelling reasons were limited to serious physical or medical conditions including terminal illness; being over 65 years of age in deteriorating physical health, provided a substantial amount of the sentence has already been served; or dire family circumstances.

Moreover, such motions could only be brought by the warden of the institution in which the incarcerated person was serving. Not surprisingly, therefore, such motions were seldom sought and even more rarely granted.

All that changed significantly with the advent of the First Step Act, passed in 2018, and the subsequent COVID-19 pandemic. For the first time, the First Step Act allowed people in federal prison to petition a court for compassionate release should the warden fail or refuse to bring a motion on their behalf.

And the pandemic ultimately led the commission to significantly expand the grounds for what may constitute extraordinary and compelling reasons for a sentence reduction. The most recent amendments went into effect Nov. 1, 2023.

Among the new criteria is whether (1) an incarcerated person at heightened risk of an



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infectious disease is housed at a facility experiencing an outbreak; (2) they have suffered sexual or physical abuse by an employee or contractor of the BOP, and (3) a nonretroactive change in law would have resulted in a much lower sentence had the law been in effect at the time they were originally sentenced. For this last criterion, they will have to have first served at least 10 years in prison.

But one of these new grounds in particular is quite telling and perhaps the most important of all. As mentioned, an incarcerated person may now seek compassionate release if they were

a victim of: (A) sexual abuse involving a "sexual act," ... ; or (B) physical abuse resulting in "serious bodily injury," ... that was committed by, or at the direction of, a correctional officer, an employee or contractor of the Bureau of Prisons, or any other individual who had custody or control over the defendant.[2]

According to the commission, "[t]his [new] provision responds to the [U.S.] Department of Justice's ... suggestion that a sentence reduction may be appropriate where an individual in BOP custody has been determined to have been the victim of sexual assault perpetrated by BOP personnel." [3]

Indeed, in public comment to the commission, the DOJ wrote that it "believes that compassionate release ... may be appropriate ... for individuals who are the victims of sexual misconduct perpetrated by BOP employees, and the Director of the Bureau of Prisons has made clear that she will consider moving for a sentence reduction on that ground." [4]

Corroborating all this, on Jan. 28, "60 Minutes" ran an extremely critical segment regarding the BOP. [5] The segment reported on the many long-term, systemic problems within the BOP, including the very high incidence of rape and abuse of inmates by staff, as well as critical staffing shortages.

Shane Fausey, the former president of the correctional officers' union, stated on the record that the union believes the BOP is currently 40% understaffed, which places lives in danger. According to Fausey, "[i]t results in one of us losing our lives. And it's that bad. ... The less supervision you have, the more bad things happen. Misconduct increases. Violence increases."

These struggles could not come at a worse time, as the BOP's inmate population is over its rated capacity — and growing. [6]

Thus, as even the DOJ and the director of the BOP seem to realize, compassionate release not only is appropriate, but should be granted more frequently in light of the inherently dangerous conditions presented by the understaffed, overpopulated and mismanaged BOP.

How does it work?

The first step to seeking compassionate release is for an incarcerated person to ask the warden to file a motion for a sentence reduction on their behalf. As noted above, if the warden fails or refuses to file such a motion within 30 days of the request, then — and only then — may the incarcerated person directly move the court in which they were originally sentenced for compassionate release.

However, in addition to establishing extraordinary and compelling reasons for compassionate release, they will also have to demonstrate to the court that granting

compassionate release is consistent with the factors set forth in Title 18 of the U.S. Code, Section 3553(a).

Although there are no hard-and-fast rules, the most pertinent factors courts tend to look at are: (1) whether the person has already served a significant portion of their sentence — generally at least half, although there have been exceptions; (2) whether a reduction in sentence would undermine respect for the law; and (3) whether a reduction would create unwarranted sentencing disparity.

Additionally, having a clean disciplinary record is a near necessity for obtaining a sentence reduction, as well as clearly identifying a release plan.

Actual hearings almost never occur, with the vast majority of compassionate release motions decided "on the papers," i.e., on the motion; the government's opposition, which it almost always files; and any reply the incarcerated person might file.

If the person is seeking compassionate release on medical or psychological grounds, medical records will be required.

There is no timeline for deciding these motions, and sometimes they can take months for a court to resolve depending on the particular court's docket management practices and caseload. Thus, filing supplemental motions apprising the court of any pertinent and significant changes in an incarcerated person's condition while the motion is pending may be necessary.

If a court does reduce someone's sentence to time-served, the person will then begin serving the supervised release portion of the original sentence immediately. Courts have the authority to, and often do, add as a condition of supervised release that the person serve a period of home confinement.

Conclusion

While compassionate release has been available since 1984, it was grossly underutilized in the past as only the BOP could petition for it on behalf of a person in detention.

In recognition of that nearly insurmountable hurdle, Congress largely removed that obstacle in 2018. Moreover, last fall, the commission significantly expanded the grounds for what constitutes extraordinary and compelling reasons, which, as discussed, now include abuse of incarcerated individuals by corrections officers, given how rampant such abuse has become.

To be sure, it is by no means easy to convince a court that there are extraordinary and compelling reasons for a sentence reduction, and that doing so would not create unwarranted sentencing disparity or otherwise promote disrespect for the law.

Still, the commission has encouraged people in prison to seek, and courts to grant, compassionate release when warranted. This is especially important as variants of COVID-19 are still circulating within the BOP, which has been long-plagued by low employee morale, abuse of those incarcerated, and administrative challenges, and where a majority of BOP institutions remain near or over their rated capacities and growing.

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[1] 28 U.S.C. § 994(t).

[2] USSG §4C1.1(b)(4).

[3] USSG, App. C, Amend. 814 (Reason for the Amendment).

[4] Letter to Hon. Carlton W. Reeves, Chair, from Jonathan Wroblewski, Dir. Ofc. of Policy and Legislation, Crim. Div., DOJ, Feb. 15, 2023, at 4-5, available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180_public-comment.pdf (see pp. 390-391 of the PDF document).

[5] Cecilia Vega, 60 Minutes, Inside the Bureau of Prisons, a federal agency plagued by understaffing, abuse, disrepair, Jan. 28, 2024, available at <https://www.cbsnews.com/news/bureau-of-prisons-understaffing-abuse-disrepair-60-minutes-transcript/>.

[6] U.S. DOJ, Federal Prison System FY 2024 Performance Budget at 7 (estimating that BOP facilities will be at least 10% overcrowded this year, up from 6% undercapacity in 2020), https://www.justice.gov/d9/2023-03/bop_se_fy_2024_pb_narrative_omb_cleared_3.23.2023.pdf.