

# The Nuts and Bolts of Compassionate Release Applications for Federal Inmates

By Matthew S. Adams  
and Marissa Koblitz Kingman



## Is Your Client Entitled to Compassionate Release?

Since the pandemic began, courts have been inundated with Compassionate Release applications from attorneys seeking the immediate or early release of clients in custody, as well as motions seeking a delay or modification of sentence for clients that have not yet surrendered. Compassionate Release can be an achievable option for some people who are incarcerated or about to surrender to a federal prison, but is often an uphill battle. Because Compassionate Release is a worthwhile opportunity, it is extremely important that attorneys have at their disposal some key practice points necessary to assist their clients during the process.

## How Do You Request Compassionate Release for Your Client?

Compassionate Release is a product of statute. The request is made by motion pursuant to 18 U.S.C. § 3582, which was amended by the First Step Act. The law allows a reduction of an inmate's term of imprisonment if the court finds that "extraordinary and compelling reasons" warrant a reduction in the person's prison sentence. The sentence modification must also be consistent with applicable policy statements of the Sentencing Commission. The Compassionate Release

decision must also consider the sentencing factors set forth in 18 U.S.C. § 3353(a).

## What are "Extraordinary and Compelling Reasons"?

The United States Sentencing Commission promulgated guidance that provide examples of "extraordinary and compelling reasons" capable of supporting a federal inmate's Compassionate Release. The examples generally fall into four categories based on a defendant's (1) terminal illness; (2) debilitating physical or mental health condition; (3) advanced age and deteriorating health in combination with the amount of time served; or, (4) compelling family circumstances.<sup>1</sup>

Since COVID-19, "extraordinary and compelling reasons" is usually demonstrated by having a medical illness that makes the defendant particularly vulnerable and susceptible to the serious side effects or death from contracting COVID-19 and if the inmate has completed a substantial portion of their sentence or was not sentenced to a significant term of federal prison in the first place. Some of the common comorbidities include: cancer, type II diabetes, obesity, heart conditions and asthma. In addition to having a medical condition, a showing that COVID-19 cases in the prison are

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rising or likely to rise is important to demonstrate. Further, other factors, such as advanced age or compelling family circumstances, can also sometimes satisfy the “extraordinary and compelling” standard.

It is imperative that you check the Bureau of Prisons website to determine the full breakdown and additional details regarding COVID-19 in the particular prison where your client is being housed or where your client is expected to report.<sup>2</sup> The BOP website provides information including, but not limited to: Completed COVID-19 cases in each prison; Pending COVID-19 test in each prison; Positive Recovered COVID-19 cases for inmates and staff members; Recovered COVID-19 cases; Deaths due to COVID-19. The BOP claims that it updates the open COVID-19 confirmed positive test numbers, recoveries, and the number of COVID-19 related deaths on its website each weekday at 3 p.m.

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and other mitigation efforts, viral spread among the prison staff members who are not restricted in their movements like locked down inmates can foreshadow a wholly unchecked outbreak.

### **The Sentencing Commission’s Policy Statement**

The Sentencing Commission’s policy statement addressing the reduction of a sentence under 18 U.S.C. § 3582 provides that a defendant’s physical and medical condition, age, and family circumstances may all serve as independent grounds for the existence of a compelling reason to reduce one’s sentence. There is no question that the older, more frail the inmate, the more likely that a Compassionate Release application will be granted. However, with the pandemic’s impact on schools and other family conditions, for example, the Sentencing Commission’s policies can provide advocates with a wide array of compelling justifications for release beyond simply the vulnerability of the inmate.

### **The 3353(a) Sentencing Factors**

The sentencing factors set forth in 18 U.S.C. § 3553(a) include, but are not limited to: (1) the nature and circumstances of the underlying offense; (2) the history and characteristics of the defendant; (3) the need for the sentence imposed to reflect the seriousness of the underlying offense; (4) the need for the sentence to provide adequate deter-



*MATTHEW S. ADAMS is a partner with Fox Rothschild LLP in Morristown, and Co-Chair of the firm’s White Collar Criminal Defense & Regulatory Compliance practice group. Matthew is an officer and trustee of the Association of Criminal Defense Lawyers of New Jersey. He has a diverse national practice focusing on criminal defense, regulatory compliance and complex commercial litigation.*



*MARISSA KOBLITZ KINGMAN is a senior associate in the White Collar Criminal Defense & Regulatory Compliance practice group at Fox Rothschild LLP. Marissa was named to the “Ones to Watch” list in New Jersey and New York by Best Lawyers, named to “New Leaders of the Bar” by New Jersey Law Journal, and selected to the “Super Lawyers–Rising Stars” list for Criminal Defense Litigation in New Jersey. Marissa is a trustee of the Association of Criminal Defense Lawyers of New Jersey and an active member of the New Jersey chapter of the Women’s White Collar Defense Association.*

rence; (5) the need to protect the public from further crimes of the defendant; and (6) the need to avoid unwarranted sentence disparities.

For Compassionate Release applications, courts look to whether the underlying offense was violent, if the defendant had a violent history or posed any threat to the community, and if the portion of the prison sentence completed, to date, was long enough and appropriately deterred the defendant’s conduct.

## **When Do You Request Compassionate Release for Your Client?**

### ***Exhaustion Requirement***

Although the compassionate release statute previously permitted sentence reductions only upon motion of the Director of the BOP, Congress expanded the statute in the First Step Act of 2018.<sup>3</sup> As amended, 18 U.S.C. § 3582(c)(1)(A) now permits courts to consider motions filed by the defendant so long as “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 after “the lapse of 30 days from the receipt of such a request by the warden of the defendant’s facility, whichever is earlier[.]” Accordingly, as discussed in further detail below, prior to filing a Compassionate Release application with the trial court, a client should request Compassionate Release through the BOP.

The Third Circuit has held that defendants seeking Compassionate Release must comply with § 3582(c)(1)(A)’s exhaustion requirement. BOP must be given 30 days to consider the defendant’s request to move for Compassionate Release on the defendant’s behalf prior to the defendant making a request to a district court.<sup>4</sup>

Some courts, however, have waived the exhaustion requirement.<sup>5</sup> Other courts have permitted defendants to file Compassionate Release applications directly with the trial court if making the request to the BOP would be futile.<sup>6</sup>

### ***Pre-Surrender Relief***

While less courts have granted pre-surrender Compassionate Release, meaning that the defendant has not yet surrendered to the prison, it is possible to win such an application.<sup>7</sup> A defendant can request that the court, Warden and/or counsel for the BOP modify the defendant’s sentence to time served and convert the unserved prison term to

supervised release with the additional condition of home confinement even before the defendant has ever stepped foot inside a prison. While a person must satisfy all of the requirements outlined above for a pre-surrender Compassionate Release application, it is also important to show some kind of changed circumstance from the date of sentencing to the date of the Compassionate Release application.

### ***Relief While Incarcerated***

Inmates can file a Compassionate Release application at any time while incarcerated and after exhausting one’s administrative remedies. The shorter the prison sentence, and the more time the defendant has served of that prison sentence, the higher the probability that the applicable sentencing factors will be weighed in the defendant’s favor.

## **Who Should You Address Your Compassionate Release Request to?**

The short answer is—everyone.

### ***BOP Senior Counsel***

There is a BOP senior counsel who is assigned to the different prisons and regions. It is important that a Compassionate Release application be sent to that person. It is also important to contact BOP counsel and discuss the defendant’s specific circumstances. The BOP counsel can be a helpful ally throughout the Compassionate Release process, or at least assist in preparing preemptive attacks on the government’s anticipated arguments.

### ***Warden***

In some jurisdictions, contacting the Warden prior to filing a Compassionate Release application is required. The Compassionate Release statute previously permitted sentence reductions only upon motion of the Director of the BOP. Currently, however, the statute permits courts to consider motions filed by the

defendant as long as the defendant has exhausted all administrative rights. In order to exhaust one’s administrative rights in the Compassionate Release context, one must make a Compassionate Release request to the Warden. Once the request is made to the Warden, and the Warden either denies the request or 30 days has passed, (whichever is earlier), the person may then file a Compassionate Release motion before the Court. The request to the Warden must contain specific language in order to begin the 30-day clock.

### ***The Judge***

The Compassionate Release Motion should be filed before the district court judge who sentenced the defendant.

### ***The Government***

While most Assistant United State Attorneys (AUSA) do not “consent” to a compassionate release application, an AUSA will occasionally “take no position” on the application—which is as good as it gets from the government. So, it is important that attorneys communicate with the AUSA assigned to the case and understand the government’s position on a potential Compassionate Release application.

## **Does Your Client Have a Transition Plan?**

In the application for Compassionate Release, you must include your client’s release plan. This includes, but is not limited to: where the client will be living; who the client will be living with; and expected work proposal.

## **Conclusion**

Courts around the country have granted Compassionate Release applications. Over 224 federal inmates in BOP custody and four BOP staff members have died due to COVID-19. Given how contagious COVID-19 is, there is a real danger that inmates will be exposed to

and contract COVID-19. In some prisons, COVID-19 cases have risen at a dramatic and alarming rate.<sup>8</sup> Often, Compassionate Release affords an attainable avenue to save your client's life. ☞

**Endnotes**

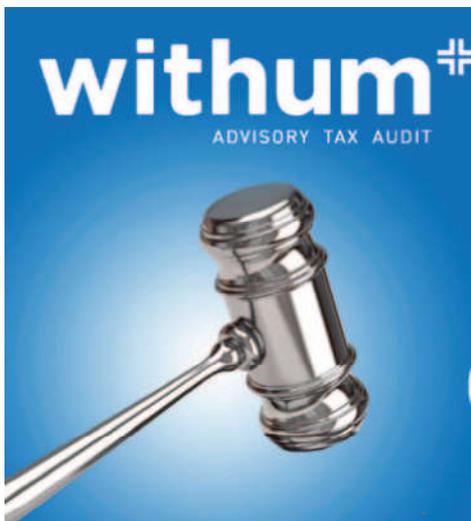
1. U.S.S.G. § 1B1.13 cmt. 1(A)–(C).
2. [bop.gov/coronavirus/](http://bop.gov/coronavirus/)
3. Pub. L. 115-391 § 603(b), 132 Stat. 5194, 5239 (Dec. 21, 2018).
4. *United States v. Raia*, 954 F.3d 594, 597 (3d Cir. 2020)
5. See e.g., *United States v. Gentile*, No. 19 Cr. 590 (KPF), 2020 WL 1814158 (S.D.N.Y. Apr. 9, 2020) (granting release where government agreed to waive exhaustion); *United States v. Park*, No. 16 Cr. 473 (RA), 2020 WL 1970603 (S.D.N.Y. Apr. 24, 2020) (granting compassionate release after government agreed to waive

exhaustion).

6. The exhaustion requirement may be waived under the following circumstances: (1) the relief sought would be futile upon exhaustion; (2) exhaustion via the agency review process would result in inadequate relief; or (3) pursuit of agency review would subject the petitioner to undue prejudice. Poulos, No. 2:09-CR-109, 2020 WL 1922775, at \*1 (E.D. Va. Apr. 21, 2020).
7. See e.g., *United States v. Hussain*, 3:16-cr-00462-CRB, at 4-5 (N.D. Cal. October 6, 2020) (holding that a pre-surrender defendant had exhausted his administrative remedies even though he was not in BOP custody and thus could decide the motion on the merits, and stating that the language of 18 U.S.C. 3582(c)(1)(A) “requires a

defendant to exhaust his administrative rights before moving for relief; it does not expressly require a defendant to exhaust those rights while in custody. Nor does the statute imply that the defendant must be in custody.”; *United States v. Vernell Butler*, 1:14-cr-00445 (N.D. Ill. April 6, 2020); *United States v. Quinones-Santos*, 3:17-cr-00278-JAG (P.R. September 20, 2020); *United States v. Peter J. Konopka*, 1:17-cr-00616 (N.D. Ill. September 10, 2020); *United States v. Joe Turner*, 2:18-cr-0012-LA (E.D. Wisc. September 24, 2020).

8. See e.g., from October 8, 2020, to November 30, 2020, the number of COVID-19 active positive inmate cases increased exponentially from five to 331 active COVID-19 cases.



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