

CA NO. 20-30086  
IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JONATHAN N. MILLAGE,

Defendant-Appellant.

DC NO. 3:13-CR-234-SI

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**BRIEF OF AMICI CURIAE NINTH CIRCUIT FEDERAL AND  
COMMUNITY DEFENDER ORGANIZATIONS IN SUPPORT OF  
DEFENDANT-APPELLANT**

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APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF OREGON  
HONORABLE MICHAEL H. SIMON

United States District Judge

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Statement of the Interest of Amici Curiae, Corporate Disclosure  
Statement, and Statement of Authority to File.

The Ninth Circuit Federal and Community Defender

Organizations listed below advocate on behalf of the criminally accused pursuant to 18 U.S.C. § 3006A, with the core mission of protecting the constitutional rights of their clients and safeguarding the integrity of the federal criminal justice system. Specific to this case, Defenders have represented thousands of individuals who are now housed in federal prisons around the country, including facilities that are experiencing exponential increases in infections from COVID-19. They have particular knowledge of the difficulties incarcerated individuals face in completing administrative requests for compassionate relief, and a strong interest in the accurate development of the law in this area.

No party or party's counsel or any person other than employees of amici curiae authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief.

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## I. INTRODUCTION

The compassionate release statute, 18 U.S.C. § 3582(c)(1)(A), serves as an important safety valve in the federal sentencing system. Once a federal sentence becomes final, a number of rules serve to keep the finality of that sentence intact. In some cases, however, circumstances arise that can significantly alter the calculus conducted at the original sentencing or cast doubt on the need for further incarceration. Congress wanted the district court to have discretion to take another look in appropriate cases, and it did so through enacting the compassionate release statute. From the get-go, Congress was clear that it wanted to “keep[] the sentencing power in the judiciary where it belongs,” Sen. Rep. 98-225, at \*60, 1983 WL 25404 (Aug. 4, 1983), and so the statute vested decision-making power in the district court.

Congress initially tasked the Bureau of Prisons with bringing “extraordinary and compelling” cases to the attention of the district court for adjudication. But the BOP proved unfit for the task. Between 2013 and 2017, the Bureau of Prisons approved just six percent of the 5,400 applications it received, and 266 inmates who requested compassionate release died in custody before the sentencing judge was



given an opportunity to weigh in.<sup>1</sup> In a key report on the BOP's administration of compassionate release—a report that helped spur the First Step Act's reforms to compassionate release—the Department of Justice's Office of Inspector General explained that the BOP's management of compassionate release prevented many inmates “who *may be* eligible candidates for release” from even being considered and left “terminally ill inmates dying before their requests were decided.” U.S. Dep't of Justice Office of the Inspector General, *The Federal Bureau of Prisons' Compassionate Release Program* at i (Apr. 2013).<sup>2</sup>

To restore compassionate release to its intended role—a mechanism for empowering *judges* to consider sentencing reductions in appropriate cases—Congress enacted section 603 of the First Step Act. Pub. L. No. 226-391, § 603, 132 Stat. 5194, 5238-40 (2018). The First Step Act loosened the BOP's grip on the pipeline of cases presented to the district court by permitting inmates to petition courts directly. It

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<sup>1</sup> See Christie Thompson, *Old, Sick and Dying in Shackles*, The Marshall Project (Mar. 7, 2018), *available* <https://www.themarshallproject.org/2018/03/07/old-sick-and-dying-in-shackles>.

<sup>2</sup> *Available* <https://oig.justice.gov/reports/2013/e1306.pdf> (emphasis added).

still gave the BOP a role to play—the BOP would get 30 days in which to investigate a compassionate release request and make an administrative decision or refer the case to the court. *See* 18 U.S.C. § 3582(c)(1)(A) (permitting defendant to bring a motion after “fully exhaust[ing] 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, whoever is earlier[.]”). But the message from Congress to the BOP was clear: triage compassionate release claims quickly, or be cut out of the process entirely.

In ordinary times, in most cases, Congress would have seen 30 days—14 days in the case of terminally ill inmates—as an adequate compromise between the facility’s need to conduct its investigation and an inmate’s needs for a prompt determination. Thirty days would give the BOP time to gather medical records and background information about the inmate. And whether it ultimately made a motion or not, the agency’s factual record might inform the sentencing court’s determination of whether extraordinary and compelling reasons exist.

These, however, are not ordinary times. Under current conditions, staff shortages and conflicting marching orders have left facilities

unable to conduct much meaningful process at all during the 30-day period. Meanwhile, a 30-day wait is intolerable for a disease that can go from asymptomatic to fatal in less than a week. Cassidy McDonald, *Federal Prisons Confirm First Staff Death Linked to Coronavirus*, CBS News (Apr. 18, 2020) (describing USP Atlanta employee who died of COVID-19, who was tested by the BOP, found asymptomatic, and cleared for entry to the facility less than a week earlier).<sup>3</sup>

Appellant's Brief persuasively argues that the exhaust-or-wait rule should be subject to equitable exceptions, including futility, inadequacy, and irreparable harm. Amici write to describe why district courts so desperately need that authority during the current crisis.

## II. ARGUMENT

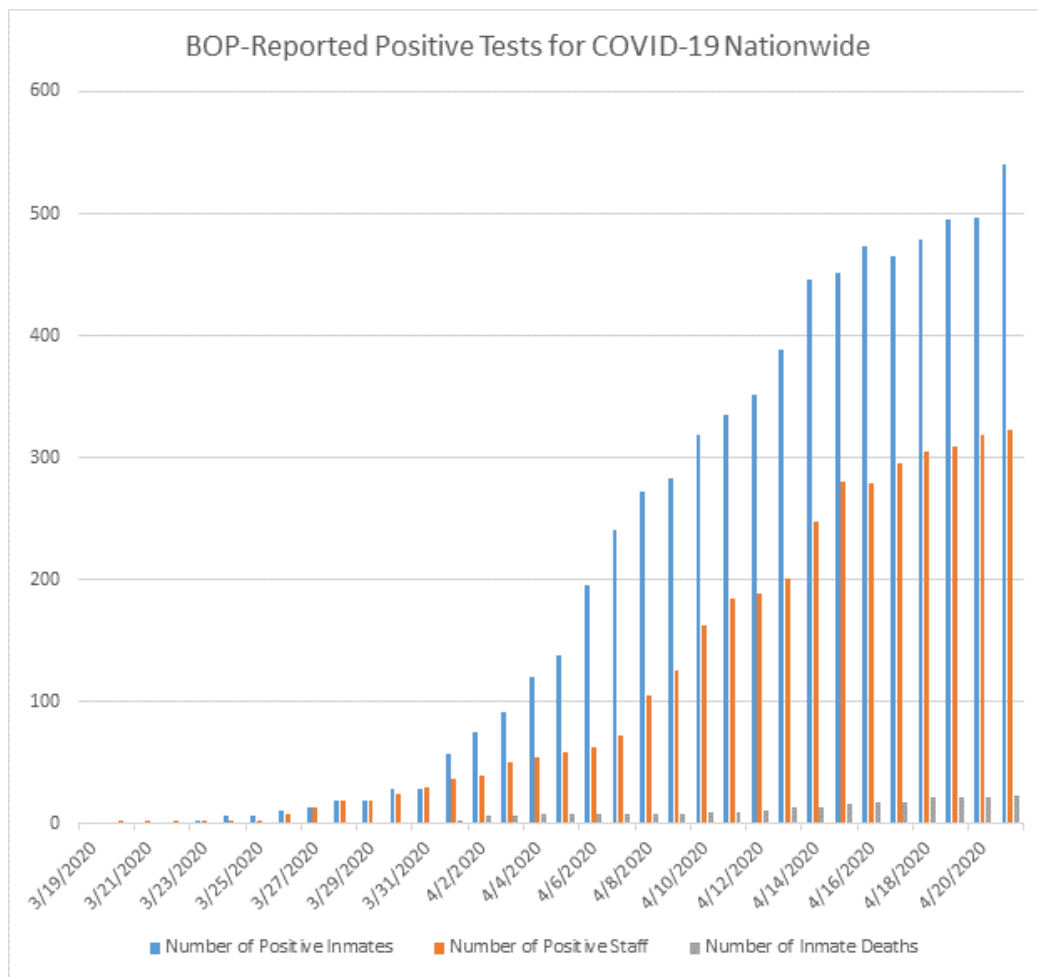
### A. COVID-19 Has Hit The Bureau of Prisons Hard.

On March 21, 2020—30 days ago—the BOP announced its first reported inmate case of COVID-19. As of today, the BOP has 863 positive cases of COVID-19: 540 among inmates, and 323 among staff. Twenty-three inmates and one BOP staff member have died of the

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<sup>3</sup> Available <https://www.cbsnews.com/news/coronavirus-federal-prisons-confirm-first-staff-death-linked-to-covid-19-robin-grubbs-usp-atlanta/>

illness. The increase in BOP cases over the past weeks represents a terrifying epidemic curve.



And even these numbers are almost certainly an undercount, because there is almost no testing being conducted at the most seriously affected sites. See Eric Heisig, *Judge Grills Federal Prisons Lawyer On Lack of Coronavirus Tests*, Cleveland.com (Apr. 18, 2020) (stating that FCI Elkton, one of the hardest hit facilities, has tested 59 people out of its

population of 2000 inmates, and receives only 25 tests per week);<sup>4</sup> Tom McParland & Jane Wester, *NY Members of Congress Demand Aggressive and Immediate Covid-19 Testing* (Apr. 17, 2020) (reporting that only 19 inmates at MDC and MCC in New York City have been tested, out of population of 2,400, with 10 of those 19 testing positive).<sup>5</sup>

It's not that the BOP hasn't taken measures to attempt to control the spread. All inmates have been generally locked down since March 31, 2020, and the BOP has mandated certain cleaning measures and issuance of protective gear. *See* Bureau of Prisons, *BOP Implementing Modified Operations*.<sup>6</sup> But those measures simply haven't flattened the curve for those inside the institutions' walls.

Some of the hardest hit facilities have been low and minimum security facilities. A number of those facilities have dormitory-style

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<sup>4</sup> *Available* <https://www.cleveland.com/court-justice/2020/04/judge-grills-federal-prisons-lawyer-on-lack-of-coronavirus-tests-at-ohio-facility-in-wake-of-trumps-claim-that-anybody-can-get-tested.html> (last visited April 21, 2020).

<sup>5</sup> *Available* <https://www.law.com/newyorklawjournal/2020/04/17/ny-members-of-congress-demand-aggressive-and-immediate-covid-19-prevention-steps-at-citys-federal-jails/> (last visited April 21, 2020).

<sup>6</sup> *Available* [https://www.bop.gov/coronavirus/covid19\\_status.jsp](https://www.bop.gov/coronavirus/covid19_status.jsp).

bunks, with 160 people in a single room. An inmate recently released from Oakdale describes it like this:

[T]he camp, there's two large dorms filled with bunk beds stacked end to end, three feet apart widthwise. So when you're sleeping on your bunk bed, you're within three feet of 12 people snoring and breathing hard. So there's a lot of common breaths going on in there.

Janet Reitman, *"Something Is Going to Explode": When Coronavirus Strikes a Prison* N.Y. Times Magazine (Apr. 19, 2020).<sup>7</sup>

This is what that looks like in FCI Fort Dix:



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<sup>7</sup> Available

<https://www.nytimes.com/2020/04/18/magazine/oakdale-federal-prison-coronavirus.html>. The article details just how many of the BOP's stated requirements are being honored in the breach.

See Joe Atmonavage, “*People are Scared.*” *Inside a federal prison in N.J. amid the coronavirus outbreak*, N.J. Advance Media (Apr. 17, 2020).<sup>8</sup>

Despite the BOP’s efforts, coronavirus continues to spread, putting prisoners, staff, and the communities that surround BOP facilities in greater and greater danger.

**B. The Bureau of Prisons Is Facing Serious Tests to its Capacity.**

Though the BOP maintains, publicly, that everything is under control, the pandemic is clearly straining its resources. BOP facilities have been overcrowded and understaffed for years.<sup>9</sup> The current crisis, which has left a significant number of employees sick and a great deal more quarantined, has stretched the agency even thinner. Co-located facilities that used to share staff for economies of scale can no longer do

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<sup>8</sup> Available <https://www.nj.com/coronavirus/2020/04/people-are-scared-inside-a-federal-prison-in-nj-amid-the-coronavirus-outbreak-video.html>.

<sup>9</sup> See *Oversight of the Federal Bureau of Prisons and Implementation of the First Step Act of 2018: Hearing before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 115th Cong. 2-4 (2019) (statement of Kathleen Hawk Sawyer, Director, Fed. Bureau of Prisons), <https://docs.house.gov/meetings/JU/JU08/20191017/110089/HHRG-116-JU08-Wstate-SawyerK-20191017.pdf>.

so. Counselors, teachers, and nurses are guarding prisoners. Joseph Neff and Keri Blakinger, *Federal Prison Agency “Put Staff in Harm’s Way” of Coronavirus*, The Marshall Project (Apr. 3, 2020).<sup>10</sup> Nurses are working around the clock, and guards “have worked shifts as long as 40 hours.” *Id.* Correctional officers on shift at hospitals wait to be relieved, but no relief comes.<sup>11</sup> BOP officials have acknowledged these issues. In a sworn declaration, the Associate Warden of Oakdale, the facility with the highest death count, admitted that “[t]he number of sick and quarantined staff has caused a number of non-custody staff to have to work in traditional custody staff roles.” *See* Declaration of Associate Warden Segovia, *Livas v. Myers*, 2:20-cv-422-TAD, Dkt. 8-1, at 3-4 (Apr. 10, 2020).<sup>12</sup>

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<sup>10</sup> *Available*

<https://www.themarshallproject.org/2020/04/03/federal-prisons-agency-put-staff-in-harm-s-way-of-coronavirus>.

<sup>11</sup> *See* “Something Is Going to Explode”, N.Y. Times Magazine (“I had an officer that got to work at 6 that morning and volunteered to work at the hospital to relieve a staff member so they could go home. Ended at midnight and never got relieved, drove back to the institution because he had another shift to pull there and fell asleep three times on the highway.”)

<sup>12</sup> *Available*

[https://www.fd.org/sites/default/files/covid19/bop\\_jail\\_policies\\_and\\_information/8-1\\_warden\\_affidavit.pdf](https://www.fd.org/sites/default/files/covid19/bop_jail_policies_and_information/8-1_warden_affidavit.pdf).



These staff shortages severely curtail the facilities' ability to respond—meaningfully, or at all—to administrative requests. Again, FCI Oakdale's Associate Warden's declaration lays this out starkly. According to the Associate Warden, he was given a list of 58 people to screen for release on home confinement, a form of administrative relief managed wholly by the BOP. *Id.* at 5. In ordinary times, this review would be conducted by case-management specialists. *Id.* But at Oakdale, the leader of the case-management team is out under quarantine, and other case-management staff are performing custody functions. *Id.* at 6. Consequently, the Associate Warden has had to assign “temporary staff” with some experience in case management to the task of reviewing home-confinement applications. With those resources, the facility had managed to review “the vast majority” of home-confinement applications. *Id.*

As for compassionate release, the same declaration makes only brief mention. It says that FCI Oakdale has received “a number” of requests since the crisis began and they are “attempting” to process the requests quickly. *Id.* at 4. Tellingly, the Associate Warden points to the changes brought about by the First Step Act that permit an inmate to

bypass the BOP and go to the district court, and notes that five inmates have been released because they did so.

At least two of those inmates got relief because a court was willing to say that the conditions in Oakdale were so horrific that the 30-day exhaust-or-wait period should be excused. *United States v. Tran*, 0:08-cr-197-DOC, Dkt. 402 (C.D. Cal. Apr. 10, 2020); *United States v. Brannan*, 4:15-cr-89, Dkt. 286 (S.D. Tex. Apr. 2, 2020).

**C. The Bureau of Prisons Is Unable to Provide Meaningful Process for Compassionate Release Requests.**

Congress modified the compassionate release statute with an eye toward both “increasing the use” of compassionate release *and* “expedi[ting] compassionate release applications.” 164 Cong. Rec. H10358 (Dec. 20, 2018); 164 Cong. Rec S7774 (Dec. 18, 2018). These purposes were reflected in Congress’s choice of an exhaust-or-wait rule: Congress declined to require the court to wait on the BOP in every case. Instead it allowed the BOP, as custodian of relevant medical and other factual records, to conduct what review it could in order to assist and expedite the district court’s consideration of the motion—but only when it could do so in a timely manner.

But Congress's premise has broken down in the current crisis. The BOP's decision to move for compassionate release is the culmination of a process that requires the input of attending physicians, counselors, case managers, social workers, wardens, and the Medical Director of the BOP. *See* Program Statement 5050.50, § 8.<sup>13</sup> Nobody has time for that right now. After canvassing all the Federal and Community Public Defender's Offices nationwide engaged in compassionate release work, no one is aware of a single BOP-initiated motion for compassionate release (that was not already finalized pre-COVID) made during the current crisis. And the idea that the BOP's triage might nevertheless shed light on the process is unrealistic given the BOP's current lack of capacity. This failure of capacity manifests in at least four different ways.

1. *In some facilities, the BOP administrative remedy process has broken down all together.*


First, in some facilities, whether because of bureaucratic red tape or the staffing problems described above, the administrative remedy process has entirely broken down.

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<sup>13</sup> *Available* [https://www.bop.gov/policy/progstat/5050\\_050\\_EN.pdf](https://www.bop.gov/policy/progstat/5050_050_EN.pdf)

At CI Taft, the Warden's Office issued a memo, a snippet of which follows, categorically declining to process any requests for release whatsoever:

**Date:** April 6, 2020  
**To:** Camp Inmate Population  
**From:** D. Patrick, Executive Assistant/Grievance Coordinator  
**cc:**  
**RE:** Response to Influx of Inmate Requests to Staff



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This is in response to the multiple Requests to Staff (Cop-outs) which have been forwarded to my office for response. Due to the number of Requests to Staff received, individual responses will not be provided, nor will any future requests regarding this same matter be addressed.

See [https://www.fd.org/sites/default/files/2020.04.06-\\_taft\\_memo.pdf](https://www.fd.org/sites/default/files/2020.04.06-_taft_memo.pdf).

At FCI Oakdale, an inmate wrote a declaration, which a district court found to be credible, saying that he submitted a request to the Warden, and his request was returned to him unanswered. *See United States v. Tran*, 0:08-cr-197-DOC, Dkt. 402 (C.D. Cal. Apr. 10, 2020) (finding declaration credible and finding an exception to Section 3582(c)(1)(A)'s exhaust-or-wait rule).

There are similar reports, from Oakdale and elsewhere. *See* Motion for Compassionate Release Under 18 U.S.C. § 3582(c)(1)(A), *United States v. Pearson*, Case No. 3:18-cr-250-HTW-FKB, Dkt. No. 61, at 11 (S.D. Miss. Apr. 1, 2020) (attorney proffer that an employee of FCI

Oakdale II told him directly that her “superiors advised her not to turn in any [compassionate release] paperwork until the BOP figures out how to respond to the ever-developing COVID-19 situation”); *see also* Families Against Mandatory Minimums, Letter to Attorney General Barr (Apr. 21, 2020) (reporting case of an elderly inmate told by his case manager “not to bring ‘that s---’ to him because he would not do anything with it”).<sup>14</sup>

This Court is not called on to decide whether these anecdotal reports are credible. Rather, this Court need decide only whether Congress intended the exhaust-or-wait rule to be absolutely mandatory, or whether it should be subject to equitable exceptions in cases where strict adherence would thwart the statute’s purposes. In the context of other exhaustion-type requirements, courts can evaluate whether such requirements should be excused because the agency has acted to thwart the administrative process or because requiring additional exhaustion would be futile. *See Ross v. Blake*, 136 S. Ct. 1850, 1859 (2016) (statute

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<sup>14</sup> Available <https://famm.org/wp-content/uploads/final-bop-letter-april-21-2020.pdf>. FAMM’s President indicates—and it mirrors reports Amici have heard—that “[w]hile most staff use less colorful language, many have discouraged prisoners from applying and often refuse to accept written requests.”

mandating exhaustion subject to exception where “prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation”); *Sun v. Ashcroft*, 370 F.3d 932, 942 (9th Cir. 2004) (futility excuses the failure to administratively exhaust where “the agency’s position on the question at issue appears already set, and it is very likely what the result of recourse to administrative remedies would be.”).

There is every reason to think that Congress would have wanted sentencing judges to engage in similar common-sense reasoning. Congress amended the First Step Act to ensure that bureaucracy would not come between the inmate and the sentencing judge. Surely it would have wanted district courts to have the authority to make common-sense judgments about whether, for example, waiting for additional BOP process would be fruitless when the facility has issued an official memo saying that it will not accept requests.

2. *In some cases, inmates are at facilities that have no BOP administrative remedy program.*

Some inmates are unable to begin the administrative process for an entirely different reason: At any given moment, a significant number of inmates in the federal system are stuck in limbo, serving their

sentence but not designated to any BOP facility. In some districts, sentenced individuals remain in local detention centers, awaiting designation or transportation to a BOP prison. Even inmates who have served a significant portion of their sentences may find themselves with a stopover in a county jail facility during transit from one facility to another. The problem of inmates-in-limbo is particularly acute right now: the BOP has enacted policies designed to limit the movement of inmates around the country, meaning that inmates are more or less stuck where they are.<sup>15</sup>

For inmates stuck in this legal no-man's-land, it is supremely important that sentencing courts be able to weigh whether it is useless to wait for a process that doesn't exist. *See United States v. Gonzalez*, 2:18-cr-232-TOR, 2020 WL 156155, at \*1 (E.D. Wash. Mar. 31, 2020) (finding a futility exception to the 30-day waiting period where inmate had not been designated to a facility yet and so could not possibly start the compassionate-release process). Even the government has acknowledged that this is the correct result. *See Letter from the United*

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<sup>15</sup> BOP Implementing Modified Operations, *available* [https://www.bop.gov/coronavirus/covid19\\_status.jsp](https://www.bop.gov/coronavirus/covid19_status.jsp).

States, *United States v. Gentry*, Case No. 2:19-cr-78, Dkt. 98 (D.N.J Apr. 5, 2020) (stating government’s view that an inmate who is not in BOP custody can fairly say he has “fully exhausted” through “conceded inability”). *See also* Joint Submission Regarding Defendant Ghorbani’s Motion for Reduction of Sentence Pursuant to Compassionate Release, *United States v. Ghorbani*, Case No. 1:18-cr-255, Dkt. 129 (D.D.C. Apr. 3, 2020) (acknowledging that § 3582(c)’s exhaust-or-wait rule can be waived when “exceptional reasons of particular urgency” exist, such as when an inmate has been sentenced but not yet designated to a BOP facility (quoting *Hendricks v. Zenon*, 993 F.2d 664, 672 (9th Cir. 1993))).

Forcing inmates who have no access to an administrative process to sit on their hands for 30 days makes no sense, and serves none of the goals that Congress intended when it amended the statute.

3. *In many cases, the BOP’s grounds for denial are not relevant to whether the district court should grant relief.*

Where inmates are actually able to submit requests, many are told that COVID-19 vulnerability is not an approved basis for the agency to submit a compassionate release motion. Consider the following warden denial:



The current pandemic of the COVID-19 virus . . . is not a qualifying factor that would warrant a motion to be filed with the sentencing court.

Warden Denial, *United States v. Petrossi*, 1:17-cr-192-CCC, Dkt. 124-4 at Exh. D (Apr. 9, 2020). This answer isn't entirely off the mark. BOP Program Statement 5050.50 sets standards for what the agency considers a sufficient basis to make a motion in the district court— and its criteria has little play in the joints.

For example, elderly inmates are at particularly high risk of serious illness or death from COVID-19. But, under the Program Statement, the BOP must deny the request of an elderly inmate unless he is (a) 70 years old, having served 30 years; (b) 65 years old, having served the greater of 10 years or 75% of the sentence; or (c) 65 years old, having served 50% of the sentence and having met certain medical benchmarks. *See* Program Statement 5050.50, § 4. An inmate can be 80 years old, with any number of serious illnesses, and at an extremely high risk of dying from COVID-19, but that inmate will never be approved by the BOP for the filing of a compassionate release motion if he doesn't hit those marks.

The BOP's Program Statement has similarly stringent criteria for compassionate-release based on a debilitating medical condition. By

policy, a medically-based request for compassionate release “should [be] consider[ed]” only if the illness is one that confines the individual to a bed or wheelchair more than 50% of waking hours and limits the individual’s ability to provide self-care. Program Statement 5050.50, § 3(b). A 60-year-old person with diabetes, hypertension, kidney disease, heart failure, or any of the other conditions that the Centers for Disease Control and Prevention say make one vulnerable to COVID-19 won’t be found eligible unless those conditions also (happens to) confine him to a wheelchair and limit his ability to perform “self-care” functions like toileting and feeding.

The time spent waiting for these denials is particularly unfortunate because the Sentencing Guidelines, which guide the district court’s decision, *see* 18 U.S.C. § 3582(c)(1)(A), contain criteria that are more generous in certain respects. For example, while Program Statement 5050.50 authorizes compassionate release for inmates 65 or older who have served “*the greater* of 10 years or 75% of the term of imprisonment to which the inmate was sentenced,” Program Statement 5050.50 § 4(c), the elderly-release criteria under the guidelines require that the defendant has served ten years or 75% of his or her sentence, whichever is *less*. *See* U.S.S.G. § 1B1.13 cmt. n.1(B). The medically-

based criterion has a similar mismatch; the BOP Program Statement forbids consideration unless the inmate has served 50% of the sentence, but the guideline has no such requirement. U.S.S.G. § 1B1.13 cmt. n.1(a)(ii).

The mismatch in criteria leads to strange exhaustion requests like this one submitted recently:

Mr. [REDACTED] is 70 years old. He is serving a [REDACTED] month sentence for stacked 924(c) sentences. He's been in custody since September 9, 1991, of 343 months.

He falls short of the 30 years required for "new law" elderly inmates, and the 50% required for elderly inmates with medical conditions, and the greater of 10 years or 75% necessary for "other elderly inmates." I do not claim that he meets the criteria for terminal illness or debilitated medical conditions.

Nevertheless, because he qualifies under U.S.S.G. § 1B1.13's requirement for the \*lesser\* of 75% or ten years, I intend to submit a request on his behalf under 18 U.S.C. § 3582(c)(1)(A) in the district court. I submit this request, therefore, to exhaust his remedies.

Any time the BOP spends considering a request that cannot be granted under the agency's policies, and any time the district court spends waiting for the agency's response, is a waste on both fronts.

Though the BOP's criteria leave it little room to move for a reduction based on COVID-19 vulnerability, a number of courts have concluded that releasing inmates who are especially vulnerable to coronavirus is consistent with the criteria in U.S.S.G. § 1B1.13.<sup>16</sup> Those

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<sup>16</sup> Orders that weigh COVID-19 vulnerability in the compassionate-release calculus include *Miller v. United States*, 2020

courts that have granted relief in the past few weeks deem it irrelevant that, under the BOP's policy, COVID-19 is not a basis for reducing a sentence.

Again, Amici are not asking this Court to make a blanket finding that the current crisis renders it always, or even generally, futile to let the BOP's processes to unfold. Rather, Congress's intent of expediting compassionate release is well served by permitting district courts, confronted with unbending BOP policy that fails to meet the current crisis, to decide whether requiring further exhaustion frustrate Congress's goal. Courts frequently consider whether agency exhaustion would be futile because denial would be required by agency policy, *Fraley v. U.S. Bureau of Prisons*, 1 F.3d 924, 925 (9th Cir. 1993), and sentencing courts should be permitted to do so here.

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WL 1814084, at \*1,4 (E.D. Mich. Apr. 9, 2020); *United States v. Colvin*, 2020 WL 1613943, at \*3-4 (D. Conn. Apr. 2, 2020); *United States v. Resnick*, 2020 WL 1651508, at \*7 (S.D.N.Y. Apr. 2, 2020); *United States v. Gonzalez*, 2020 WL 1536155, at \*2-3 (E.D. Wash. Mar. 31, 2020); *United States v. Muniz*, 2020 WL 1540325, at \*2 (S.D. Tex. Mar. 30, 2020); *United States v. Powell*, No. 1:94-cr-316-ESH, Dkt. No. 98 (D.D.C. Mar. 28, 2020); *United States v. Campagna*, 2020 WL 1489829, at \*1, 2 (S.D.N.Y. Mar. 27, 2020).

4. *District courts should have discretion to weigh a particular inmate's peril and decide whether the exhaust-or-wait rule risks intolerable harm.*

Finally, sometimes the district court is confronted with an inmate in such peril that it would be cruel to wait 30 days for a bureaucracy to act. Federal courts have long recognized that exhaustion-type requirements should sometimes be excused when delay might cause the defendant undue prejudice or irreparable harm. *Washington v. Barr*, 925 F.3d 109 (2d Cir. 2019). “[M]ere preference for a speedy resolution is not enough.” *Id.* (citation omitted). But exhaustion can be excused in cases involving “inadequacy of the prescribed procedure” and a showing of “impending harm.” *Aircraft & Diesel Equip. Corp. v. Hirsch*, 331 U.S. 752, 773-74 (1947).

In recent days, courts around the country have been presented with compelling showings of prejudice by delay, and they have not hesitated to act. In *United States v. Sawicz*, 08-cr-287, 2020 WL 1815851 (E.D.N.Y. Apr. 10, 2020), for example, the district court waived the 30-day wait-or-exhaust period in light of the COVID-19 outbreak in FCI Danbury. *Id.* at \*2. On April 10th, there were 57 positive cases at FCI Danbury. By April 20th, there were 67 total positive cases, and one death. *See* Appendix A, Decl. ¶¶ 2, 3. If Mr. Sawicz had been required to

wait 30 days from his April 5th request to the warden, he would still have several weeks left on the clock.

Morris Zukerman is another example. Mr. Zukerman is “75 years old and suffers from diabetes, hypertension, and obesity.” *United States v. Zukerman*, 2020 WL 1659880, at \*1 (S.D.N.Y. Apr. 3, 2020). On March 27, 2020, he submitted a request for compassionate release to the warden of FCI Otisville, the facility where he was housed. *Id.* at \*2. Finding that Mr. Zukerman’s continued detention at Otisville would pose “a great . . . risk of severe illness or death”—and finding that exhaustion of remedies would be futile—the district court granted him compassionate release on April 3, 2020. *Id.* at \*6. On the day the Court did so, FCI Otisville had 2 positive cases. On April 20th, there were 24 positive cases—an increase of 1,200%.<sup>17</sup> *See* Appendix A, Decl. ¶ 2. If the exhaust-or-wait requirement had not been excused, he would still have one more week to go before his claim could even be heard.

It bears repeating that the current pandemic does not place every inmate in equal danger. A sentencing court is in a good position to consider all of the relevant circumstances: the inmate’s medical

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<sup>17</sup> *See* [bop.gov/coronavirus](https://www.bop.gov/coronavirus).

condition, the most up-to-date information about conditions at a particular facility, and the CDC's information about the correlation between a particular health condition and death or serious injury from coronavirus. And it can weigh that peril against the inadequacies in the current process—the likelihood, given the current staffing crisis, that the BOP's review will produce no result within 30 days, let alone a result *faster* than 30 days,<sup>18</sup> or that it will result in a denial on grounds that are irrelevant to the district court's decision.

More to the point, all indications are that Congress would have wanted the sentencing court to have that authority. Section 603 of the First Step Act created an unusual precondition: *either* exhaust *or* wait 30 days. Congress thought it appropriate to let the BOP triage the request and weigh in, if it could do so quickly. At the same time, Congress did not view the BOP's triage as a high enough priority to make exhaustion a requirement in every case. And in the end, the

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<sup>18</sup> In the BOP's most recent (pre-pandemic) annual report to Congress, it reported that the average time between receipt by the Warden and final decision was 39 days in cases of terminal illness, and 58 days in cases premised on a debilitating medical condition. *See* Appendix C, Bureau of Prisons Annual Report to Congress (Feb. 13, 2020). If those were the median wait in good times, it is hard to believe that those times will be shorter under the circumstances described above.

district court applies its independent judgment to decide whether to reduce a sentence, with no deference to any agency decision. *See United States v. Beck*, \_\_ F. Supp. 3d \_\_, 2019 WL 1864906, at \*13 (M.D.N.C. June 28, 2019) (“[T]he terms of the First Step Act give courts independent authority to grant motions for compassionate release and say[] nothing about deference to BOP, thus establishing that Congress wants courts to take a de novo look at compassionate release motions”); *see also United States v. Decator*, 2020 WL 1676219, at \*2 (D. Md. Apr. 6, 2020) (same); *United States v. Ebberts*, \_\_ F. Supp. 3d \_\_, 2020 WL 91399, at \* n.6 (S.D.N.Y. Jan. 8, 2020) (“[N]o statute directs the Court to consult the BOP’s rules or guidelines . . . and no statute delegates authority to the BOP to define the statutory requirements for compassionate release”).<sup>19</sup> Congress reformed Section 3582(c)(1)(A) because it wanted compassionate release to be a more meaningful

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<sup>19</sup> Indeed, even “de novo review” is a misnomer. When a district court rules on a compassionate release motion, it is not *reviewing* the BOP’s decision. Instead, it is simply deciding, in the first instance, whether or not a defendant is entitled to compassionate release under the law. Both the statutory structure—which gives the BOP no role in developing criteria for granting compassionate release—and the fact that the district court is empowered to rule on a compassionate release motion even if the BOP takes no action make this clear. *Cf.* 28 U.S.C. § 994(t).



vehicle for *judicial* review of sentences, and it was willing to greatly limit the BOP's role in the process to accomplish that goal. All indicators are that Congress would not have held the exhaust-or-wait provision sacrosanct above every other consideration.

**D. Inmates At Grave Risk In Custody Are Unlikely To Be Release By Other Mechanisms.**

Media reports might suggest—and indeed, the government in some cases has intimated—that quick action by the courts is not necessary because the Attorney General is screening individuals with COVID-19 risk factors for placement into home confinement. Amici support every effort to remove vulnerable people from BOP custody and advocate expanding such efforts. At the same time, the Court should be clear that home-confinement screening is not an adequate solution to the problem.

On April 3, 2020, Attorney General Barr directed the BOP “to immediately review all inmates who have COVID-19 risk factors . . . starting with the inmates incarcerated at . . . facilities where . . . COVID-19 is materially affecting operations.” Memorandum from the Attorney General to Director of the Bureau of Prisons, *Increasing Use of Home Confinement at Institutions Most Affected by COVID-19* (Apr. 3,

2020).<sup>20</sup> When the BOP issued guidance to carry out the AG's instruction, however, the broad mandate was translated into criteria that had nothing to do with vulnerability to illness. Appendix B. Instead, the guidance weeded out anyone who wasn't a United States citizen, anyone who had any prior violent offense, no matter how remote, and anyone with any incident report in the past twelve months, among other requirements. *Id.*

These criteria significantly limit the usefulness of home confinement as a tool for addressing the current crisis. The Associate Warden of FCI Oakdale—one of the facilities that was supposed to be prioritized—said that the BOP's Central Office had given the facility a list of just 58 inmates (out of 1853 inmates) who met the baseline criteria of release. Declaration of Juan Segovia, *Livas v. Myers*, 2:20-cv-422-TAD, Dkt. 8-1 (Apr. 10, 2020).<sup>21</sup> After further institutional review, only six were approved for release on home confinement as of April 10, 2020. When required by court order to provide an update a week later,

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<sup>20</sup> Available <https://www.justice.gov/file/1266661/download>

<sup>21</sup> Available [https://www.fd.org/sites/default/files/covid19/bop\\_jail\\_policies\\_and\\_information/8-1\\_warden\\_affidavit.pdf](https://www.fd.org/sites/default/files/covid19/bop_jail_policies_and_information/8-1_warden_affidavit.pdf)

the Associate Warden said that the figure still stood at six. *See* Declaration of Juan Segovia, *Livas v. Myers*, 2:20-cv-422-TAD, Dkt. 14-1, at 2 (Apr. 16, 2020).<sup>22</sup>

The same pattern repeated itself at FCI Elkton, a low security facility that is among the hardest hit by coronavirus, with six inmate deaths to date. Again, in a lawsuit, BOP staff revealed that, in a facility of 2,500 inmates, only six have been approved for home confinement. *See* Declaration of Kristy Cole, *Wilson v. Williams*, 4:20-cv-794-JG, Doc. 10-2, at 7 (Apr. 17, 2020).

The BOP's criteria leave many inmates out in the cold—even inmates who are both good candidates for compassionate release and whose release would not present any danger to the community. A detainer has nothing to do with vulnerability to COVID-19. *See* Govt. Surreply, *United States v. Krokos*, Doc. 1009 (C.D. Cal. Apr. 6, 2020) (suggesting that the district court should stay consideration of compassionate release request while the BOP processes ran its course, while admitting that detainer on a Canadian citizen would preclude

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<sup>22</sup> *Available*

[https://www.fd.org/sites/default/files/covid19/bop\\_jail\\_policies\\_and\\_information/14-1\\_april\\_16\\_declaration\\_with\\_rc\\_memo\\_attached.pdf](https://www.fd.org/sites/default/files/covid19/bop_jail_policies_and_information/14-1_april_16_declaration_with_rc_memo_attached.pdf)

home confinement consideration). Similarly, an inmate can receive a discipline report for cursing at a guard, or smoking out of bounds—violations that say nothing about suitability for release or vulnerability to COVID-19. Given the agency’s limitations, the home confinement program will not, by itself, solve the problem.

### **III. CONCLUSION**

In the context of the current crisis, if the exhaust-or-wait provision is treated as a mandatory requirement, there is a high risk that avoidable death and serious illnesses will occur. This is true for vulnerable inmates who deserve compassionate release and risk contracting the illness every day they remain in a facility. It is equally true for the staff who must monitor these most vulnerable populations, and for everybody who must remain in overcrowded facilities with no space for meaningful social distancing. There are strong legal grounds, persuasively described in Mr. Millage’s brief, for the Court to conclude that the exhaust-or-wait provision should be subject to equitable exceptions, and the facts on the ground cry out for such flexibility.

Amici urge the Court to conclude that § 3582(c)(1)(A)'s exhaust-or-wait provision is not a mandatory prescription.

Respectfully submitted,

/s/ Brianna Mircheff  
BRIANNA MIRCHEFF

/s/ Miles Pope  
MILES POPE

Attorneys for Amici Curiae

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. 29(a)(5), I certify that this amicus brief is proportionally spaced, has a typeface of 14 points or more, and contains approximately 5,602 words (which includes a manual count of the words contained in images).

DATED: April 21, 2020

By /s/ Brianna Mircheff  
BRIANNA MIRCHEFF

## DECLARATION OF MILES POPE

I, Miles Pope, declare as follows:

- 1) I am an attorney with the Federal Defender Services of Idaho, Inc. I am over the age of 18, and I have personal knowledge of the following facts.
- 2) On April 21, 2020, I reviewed screenshots of the BOP's coronavirus tracking website—[www.bop.gov/coronavirus](http://www.bop.gov/coronavirus)—taken on all but two days between April 3, 2020 and April 20, 2020. I focused this review on the number of positive cases at FCI Danbury and FCI Otisville. For each day, this website lists the number of confirmed positive COVID-19 cases among inmates and staff at each BOP facility, as well as the total number of deaths at each facility that the BOP attributes to COVID-19. Below is a table summarizing the total number of cases at each facility on each day between April 3, 2020 and April 20, 2020

<b>Date</b>	<b>FCI Danbury</b>	<b>FCI Otisville</b>
4.3.2020	26 cases	2 cases
4.5.2020	28 cases	3 cases
4.6.2020	29 cases	4 cases
4.7.2020	40 cases	5 cases
4.8.2020	46 cases	5 cases
4.9.2020	51 cases	5 cases
4.10.2020	57 cases	9 cases
4.12.2020	67 cases	10 cases
4.13.2020	69 cases	11 cases
4.14.2020	83 cases	12 cases
4.15.2020	70 cases	14 cases
4.16.2020	68 cases	21 cases
4.17.2020	71 cases	25 cases
4.18.2020	69 cases	24 cases
4.19.2020	67 cases	24 cases
4.20.2020	67 cases	24 cases

- 3) Additionally, the BOP's website reflects that, as of April 20, 2020, there has been 1 inmate death at FCI Danbury.
- 4) Attached to this declaration as Appendix B is a true and correct copy of an undated memorandum from David Brewer, Acting Senior Deputy Assistant Director of the Bureau of Prisons, to BOP Correctional Program Administrators. Appendix C is a true and correct copy of a letter from Kathleen Hawk Sawyer, Director of the Bureau of Prisons, to Jerrold Nadler, Chairman, House Judiciary Committee, dated February 13, 2020.

I hereby state that these facts are true and correct to the best of my knowledge.

Dated this 21st day of April 2020.

/s/Miles Pope

Miles Pope  
Assistant Federal Defender





**U.S. Department of Justice**  
**Memorandum**  
**Federal Bureau of Prisons**

Correctional Programs Branch

Central Office  
320 First Street, N.W.  
Washington, DC 20534

MEMORANDUM FOR CORRECTIONAL PROGRAM ADMINISTRATORS

FROM:   
David Brewer, Acting Senior Deputy Assistant  
Director

SUBJECT: Furlough and Home Confinement Additional Guidance

The following guidance is provided from information contained in the CARES Act, memoranda from Attorney General Barr, and the Bureau of Prisons. This memorandum rescinds guidance previously provided.

**Furlough**

The current pandemic is considered an urgent situation that may warrant an emergency furlough under 570.32(b)(1) and 570.33(b). These regulations authorize a non-transfer emergency furlough if the inmate is otherwise deemed appropriate, even if he/she has been submitted for Home Confinement (HC). Effective April 16, 2020, all inmates referred for an emergency furlough due to the Covid-19 pandemic should be submitted and keyed as FURL CRI.

Inmates who have been referred for a release planning furlough based on guidance issued prior to April 16, 2020, do not require a new application. These inmates should be keyed out of the facility as FURL REL. Furlough applications completed on or after April 16, 2020, should follow the updated guidance. Inmates within 12 months of his/her Projected Release Date (PRD), or those who have received Home Confinement placement and have a PRD exceeding one year, should be reviewed for furlough.

**Home Confinement**

In an effort to alleviate concerns and questions, the following criteria should be met when reviewing and referring inmates for HC:

- Primary or prior offense is not violent

- Primary or prior offense is not a sex offense
- Primary or prior offense is not terrorism
- No detainer
- Mental Health Care Level is less than CARE-MH 4
- PATTERN risk score is Minimum (R-MIN)
- No incident reports in the past 12 months (regardless of severity level)
- U.S. Citizen
- Viable Release Plan

If the inmate meets the criteria above, the following factors should be noted, but are not a reason for denial:

- Age
- Projected Release Date
- Percentage of time served
- Medical Care Level
- Victim Witness Program
- Arrival dated (ARSD)

Any concerns regarding an inmate's suitability for HC placement should be noted in Section 11 of the BP-210, *Institutional Referral for CCC Placement*. It is strongly encouraged to refer inmates currently housed in a facility with active Covid-19 cases.

For inmates requesting relocation, a release plan must be submitted to the USPO prior to HC referral submission. The USPO approval letter must be forwarded to the RRM, once received. Institution staff should contact the Health Service Specialist in the RRM's office with questions regarding HC placement for inmates with medical concerns.

If you have any questions, please contact David Brewer, Acting Senior Deputy Assistant Director, Correctional Programs Division, at (202)353-3638.

**U.S. Department of Justice**

Federal Bureau of Prisons

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*Office of the Director**Washington, DC 20534*

February 13, 2020

The Honorable Jerrold Nadler  
Chairman  
Committee on the Judiciary  
U. S. House of Representatives  
Washington, DC 20515

Dear Mr. Chairman:

Section 603(b)(3) of the First Step Act of 2018, titled "Annual Report," requires the Director of the Bureau of Prisons to submit to the Committee on the Judiciary of the Senate, and the Committee on Judiciary of the House of Representatives an annual report on requests and description of sentence reductions pursuant to 18 U.S. Code § 3582 subsection (c)(1)(A). A copy of the report is enclosed.

Sincerely,

A handwritten signature in cursive script that reads "Kathleen Hawk Sawyer".

Kathleen Hawk Sawyer  
Director

Enclosure

**Federal Bureau of Prisons  
Compassionate Release - First Step Act of 2018  
Report to Congress**

**Legislative Summary:** On December 21, 2018, the President signed the First Step Act of 2018 (FSA) into law (P.L. 115-391). Title VI at Section 603(b)(3) (codified at 18 U.S.C. § 3582(d)(3)), requires the Director of the Bureau of Prisons (Bureau) to submit a report on requests and description of sentence reductions.

**Reduction in sentence:**

**A. The number of prisoners granted and denied sentence reductions, categorized by the criteria relied on as the grounds for a reduction in sentence.**

From January 1, 2019, to December 21, 2019, the Bureau's Director made RIS determinations as outlined below:

	Approved	Denied
<b>Medical-Terminal</b>	43	55
<b>Medical-Debilitated</b>	11	68
<b>Elderly-Medical</b>	0	28
<b>Elderly-Other</b>	1	14
<b>Child Caregiver</b>	0	2
<b>Spouse/Registered Partner</b>	0	1
<b>Other</b>	0	3
<b>Total</b>	55	171

**B. The number of requests initiated by or on behalf of prisoners, categorized by the criteria relied on as the grounds for a reduction in sentence.**

From January 1, 2019, to December 21, 2019, Bureau Wardens received the following number of RIS requests:

<b>Medical-Terminal</b>	342
<b>Medical-Debilitated</b>	641
<b>Elderly-Medical</b>	204
<b>Elderly-Other</b>	98
<b>Child Caregiver</b>	87
<b>Spouse/Registered Partner</b>	33
<b>Other</b>	330
<b>Total</b>	1,735

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**C. The number of requests that BOP employees assisted prisoners in drafting, preparing, or submitting, categorized by the criteria relied on as the grounds for a reduction in sentence, and the final decision made in each request.**

From January 1, 2019, to December 21, 2019, Bureau employees assisted prisoners in the drafting, preparation, or submission of the following number of potential RIS requests (note that this list is inclusive of all matters involving any manner of staff assistance, and includes potential RIS requests that may not have been ultimately submitted):

<b>Medical-Terminal</b>	293
<b>Medical-Debilitated</b>	475
<b>Elderly-Medical</b>	225
<b>Elderly-Other</b>	57
<b>Child Caregiver</b>	81
<b>Spouse/Registered Partner</b>	3
<b>Other</b>	342
<b>Total</b>	1,476

**D. The number of requests that attorneys, partners, or family members submitted on a defendant's behalf, categorized by the criteria relied on as the grounds for a reduction in sentence, and the final decision made in each request.**

From January 1, 2019, to December 21, 2019, the Bureau received the following RIS requests from attorneys, partners, or family members, on an inmate's behalf:

	Approved	Denied
<b>Medical-Terminal</b>	5	2
<b>Medical-Debilitated</b>	0	3
<b>Elderly-Medical</b>	0	2
<b>Elderly-Other</b>	0	0
<b>Child Caregiver</b>	0	0
<b>Spouse/Registered Partner</b>	0	0
<b>Other</b>	0	0
<b>Total</b>	5	7

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**E. The number of requests approved by the Director of the BOP, categorized by the criteria relied on as the grounds for a reduction in sentence.**

From January 1, 2019, to December 21, 2019, the Bureau's Director approved the following RIS requests:

<b>Medical-Terminal</b>	43
<b>Medical-Debilitated</b>	11
<b>Elderly-Medical</b>	0
<b>Elderly-Other</b>	1
<b>Child Caregiver</b>	0
<b>Spouse/Registered Partner</b>	0
<b>Other</b>	0
<b>Total</b>	55

**F. The number of requests denied by the Director of the BOP and the reasons given for each denial, categorized by the criteria relied on as the grounds for a reduction in sentence.**

From January 1, 2019, to December 21, 2019, the Bureau's Director, via the Bureau's Office of General Counsel (OGC), denied the following RIS requests:

<b>Medical-Terminal</b>	55
<b>Medical-Debilitated</b>	68
<b>Elderly-Medical</b>	28
<b>Elderly-Other</b>	14
<b>Child Caregiver</b>	2
<b>Spouse/Registered Partner</b>	1
<b>Other</b>	3
<b>Total</b>	171

The Bureau does not track the reasons for denial and, in many cases, multiple factors lead to denial. Specifically, some RIS requests are denied because the inmate does not meet the medical criteria, age, or time served requirements. Other requests are denied due to the nature and circumstances of the inmate's offense, the inmate's criminal history, the inmate's institutional adjustment, or other factors. Finally, it should be noted that the vast majority of denials occur at the institution level, which contributes to the significant difference between the numbers of requests Wardens receive and the numbers of decisions by the Director.

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**G. For each request, the time elapsed between the date the request was received by the warden and the final decision, categorized by the criteria relied on as the grounds for a reduction in sentence.**

From January 1, 2019, to December 21, 2019, the average time elapsed between the date the request was received by the Warden and the final decision, categorized by the reduction in sentence criteria (Medical-Terminal, Medical-Non-Terminal (Medical-Debilitated and Elderly-Medical), Non-Medical (Elderly-Other, Child Caregiver, Spouse/Registered Partner, and Other)) is as follows:

<b>Medical-Terminal</b>	39 days
<b>Medical-Debilitated</b>	58 days
<b>Non-Medical</b>	171 days

**H. For each request, the number of prisoners who died while their request was pending and, for each, the amount of time that had elapsed between the date the request was received by the BOP [and the date of death], categorized by the criteria relied on as the grounds for a reduction in sentence.**

From January 1, 2019, to December 21, 2019, 41 RIS requests were pending when the inmate-requester died. The annual number of such requests and the average time elapsed between the date the request was received by the Warden and the date of death, are as follows:

Type of Request	Official Request Date	Date of Death	Days Between Initial Request and Death
<b>2019</b>			
Medical – Terminal	8/23/18	1/2/19	132
Non-Medical	11/22/18	1/7/19	46
Medical – Terminal	12/19/18	1/9/19	21
Medical – Terminal	1/8/19	1/14/19	6
Medical – Non-Terminal	11/16/18	1/25/19	70
Medical – Non-Terminal	11/19/18	1/30/19	72
Medical – Terminal	1/11/19	1/31/19	20
Non-Medical	5/17/18	1/31/19	259
Medical – Terminal	8/13/18	2/16/19	187
Non-Medical	12/11/18	2/26/19	77
Medical – Terminal	11/19/18	3/2/19	103
Medical – Terminal	2/15/19	3/3/19	16
Medical – Non-Terminal	1/29/19	3/7/19	37
Medical – Terminal	2/12/19	3/8/19	24
Medical – Terminal	12/4/18	3/18/19	104
Medical – Terminal	11/15/18	3/20/19	125
Medical – Terminal	3/14/19	3/22/19	8
Medical – Terminal	3/14/19	3/31/19	17

Medical – Terminal	3/18/19	4/1/19	14
Medical – Terminal	11/20/18	4/12/19	143
Medical – Non-Terminal	1/9/19	4/28/19	109
Medical – Terminal	3/5/19	5/7/19	63
Non-Medical	2/8/19	5/10/19	91
Medical – Terminal	2/6/19	5/21/19	104
Medical – Terminal	5/14/19	6/20/19	37
Non-Medical	4/29/19	6/29/19	61
Non-Medical	4/12/19	7/4/19	83
Medical – Terminal	10/9/18	7/17/19	281
Medical – Terminal	7/12/18	7/23/19	11
Medical – Terminal	7/8/19	7/27/19	19
Medical – Terminal	4/22/19	8/1/19	101
Medical – Terminal	7/24/19	8/2/19	9
Medical – Non-Terminal	4/3/19	8/2/19	121
Medical – Terminal	4/5/19	8/4/19	121
Medical – Terminal	2/5/19	8/14/19	190
Medical – Terminal	7/29/19	8/31/19	33
Medical – Terminal	8/12/19	9/5/19	24
Non-Medical	4/22/19	9/21/19	152
Medical – Non-Terminal	5/10/19	10/27/19	170
Medical – Non-Terminal	12/28/18	11/29/19	336
Medical – Terminal	9/25/19	12/7/19	73

**I. The number of BOP notifications to attorneys, partners, and family members of their right to visit a terminally ill defendant as required under paragraph (2)(A)(ii) and, for each, whether a visit occurred and how much time elapsed between the notification and the visit.**

From January 1, 2019, through December 21, 2019, the Bureau made 41 notifications to the family members, partners, and attorneys of terminally ill inmates. A total of 20 visits were conducted. Please note that the visits tracked and included here are special visits for terminally ill inmates and do not include visits that may have occurred during regular social visiting hours. The time that elapsed between notification and visit is detailed in the table below.

Date of Family Notification	Date of Attorney Notification	Date of Visit	Time Elapsed
1/17/19	1/18/19	1/19/19	1 day
2/7/19	2/7/19	N/A	N/A
2/7/19	2/7/19	N/A	N/A
2/7/19	N/A	2/15/19	8 days
2/8/19	2/8/19	2/9/19	1 day
2/12/19	2/12/19	N/A	N/A
2/19/19	N/A	N/A	N/A
2/28/19	2/28/19	N/A	N/A



3/1/19	N/A	3/5/19	4 days
3/14/19	N/A	3/16/19	2 days
3/21/19	3/21/19	3/26/19	5 days
4/4/19	N/A	4/6/19	2 days
4/22/19	4/22/19	N/A	N/A
5/12/19	5/12/19	N/A	N/A
5/16/19	N/A	N/A	N/A
5/22/19	5/22/19	N/A	N/A
5/31/19	5/31/19	6/8/19	8 days
6/6/19	6/6/19	N/A	N/A
6/11/19	6/11/19	5/29/19	N/A
6/25/19	N/A	N/A	N/A
7/22/19	N/A	N/A	N/A
8/5/19	N/A	8/15/19	10 days
8/14/19	N/A	8/16/19	2 days
8/16/19	N/A	N/A	N/A
8/28/19	8/28/19	8/29/19	1 day
9/11/19	N/A	10/1/19	20 days
9/25/19	N/A	N/A	N/A
9/25/19	N/A	10/23/19	28 days
9/26/19	N/A	N/A	N/A
9/27/19	N/A	10/2/19	5 days
10/3/19	10/3/19	N/A	N/A
10/9/19	10/9/19	N/A	N/A
10/10/19	N/A	10/11/19	1 day
10/17/19	10/17/19	N/A	N/A
10/23/19	10/23/19	11/9/19	17 days
10/25/19	N/A	N/A	N/A
11/5/19	11/5/19	N/A	N/A
11/7/19	N/A	11/14/19	7 days
11/12/19	N/A	N/A	N/A
11/18/19	11/18/19	12/5/19 12/6/19	17 days
11/19/19	N/A	11/23/19	4 days
11/21/19	N/A	11/22/19	1 day
12/4/19	12/4/19	12/21/19 12/22/19	17 days
N/A	N/A	1/3/19	N/A
N/A	N/A	4/28/19	N/A
N/A	N/A	9/6/19 9/7/19 9/8/19	N/A
N/A	N/A	N/A	N/A
N/A	N/A	N/A	N/A

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**J. The number of visits to terminally ill prisoners that were denied by the BOP due to security or other concerns, and the reasons given for each denial.**

No visits to terminally ill prisoners were denied by the Bureau.

**K. The number of motions filed by defendants with the court after all administrative rights to appeal a denial of a sentence reduction had been exhausted, the outcome of each motion, and the time that had elapsed between the date the request was first received by the BOP and the date the defendant filed the motion with the court.**

The Bureau cannot track all motions filed by inmates seeking compassionate release pursuant to the First Step Act of 2018, as it is not the primary litigating component of the Department of Justice relative to such motions and therefore may not be made aware of motions so filed. However, the Bureau can, and does, to the extent possible, track the number of court orders issued in response to such motions and resulting in the compassionate release of an inmate. As of December 21, 2019, the Bureau was aware of 81 such orders. It should be noted that although the Bureau can provide the dates of the motions of which it is aware, and the dates of the requests in cases in which a request was filed, the Bureau cannot categorize such motions by criteria, as inmates who file motions pursuant to the First Step Act are not bound by the Bureau's RIS criteria and do not always specifically categorize the "extraordinary or compelling circumstances" upon which they seek a reduction in their sentence.

As far as the Bureau is aware, from January 1, 2019, to December 21, 2019, inmates filed the following motions resulting in an order granting the motion:

Request Date	Motion Date	Outcome
1/22/19	1/8/19	Motion granted
11/7/18	1/14/19	Motion granted
9/4/18	1/24/19	Motion granted
5/1/19	1/24/19	Motion granted
5/31/17	1/28/19	Motion granted
8/29/18	2/1/19	Motion granted
7/23/18	2/1/19	Motion granted
7/30/18	2/4/19	Motion granted
2/4/19	2/5/19	Motion granted
8/23/17	2/6/19	Motion granted
None	2/11/19	Motion granted
6/22/18	2/19/19	Motion granted
12/10/18	2/24/19	Motion granted
10/18/18	2/25/19	Motion granted
1/28/19	2/27/19	Motion granted
1/8/18	3/5/19	Motion granted
1/21/19	3/6/19	Motion granted
1/31/19	3/8/19	Motion granted

3/12/19	3/11/19	Motion granted
1/30/19	3/11/19	Motion granted
3/10/19	3/11/19	Motion granted
1/7/19	3/11/19	Motion granted
6/24/19	10/2/19	Motion granted
5/9/18	3/18/19	Motion granted
8/7/18	3/25/19	Motion granted
6/20/19	4/3/19	Motion granted
11/29/18	4/4/19	Motion granted
1/28/19	4/8/19	Motion granted
3/3/19	4/15/19	Motion granted
10/3/18	4/23/19	Motion granted
3/15/19	4/26/19	Motion granted
9/7/18	5/6/19	Motion granted
9/27/18	5/10/19	Motion granted
1/10/19	6/4/19	Motion granted
4/16/19	6/6/19	Motion granted
5/17/19	6/7/19	Motion granted
2/28/19	6/10/19	Motion granted
6/28/17	6/11/19	Motion granted
5/29/19	6/13/19	Motion granted
2/22/19	6/13/19	Motion granted
3/27/19	6/18/19	Motion granted
10/3/18	6/20/19	Motion granted
4/1/19	6/20/19	Motion granted
1/28/19	6/26/19	Motion granted
6/8/19	6/27/19	Motion granted
5/18/16	7/5/19	Motion granted
6/13/19	7/8/19	Motion granted
5/9/19	7/11/19	Motion granted
5/24/19	7/12/19	Motion granted
3/25/19	7/15/19	Motion granted
4/3/19	7/15/19	Motion granted
2/28/19	7/18/19	Motion granted
2/21/19	7/31/19	Motion granted
7/31/18	8/5/19	Motion granted
7/2/19	8/7/19	Motion granted
7/2/19	8/7/19	Motion granted
3/19/18	8/7/19	Motion granted
7/3/19	8/13/19	Motion granted
1/23/18	8/14/19	Motion granted
10/5/17	8/21/19	Motion granted
6/26/19	8/22/19	Motion granted
10/26/18	8/27/19	Motion granted
5/16/19	8/29/19	Motion granted

6/14/19	8/30/19	Motion granted
8/3/19	9/5/19	Motion granted
8/2/19	9/5/19	Motion granted
2/28/19	9/10/19	Motion granted
7/9/19	9/13/19	Motion granted
9/13/19	9/13/19	Motion granted
5/20/19	9/23/19	Motion granted
8/30/19	10/2/19	Motion granted
9/4/19	10/4/19	Motion granted
9/13/19	10/8/19	Motion granted
5/29/19	10/15/19	Motion granted
8/23/19	10/17/19	Motion granted
No record	10/20/19	Motion granted
9/26/19	10/24/19	Motion granted
11/8/19	11/7/19	Motion granted
10/8/19	11/14/19	Motion granted
5/28/19	11/27/19	Motion granted
8/12/19	12/13/19	Motion granted