

FIRST STEP ACT OF 2018

Early Release Mechanisms:
Home Confinement and “Reduction in Sentence”

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NACDL Webinar, July 25, 2019

Early Eligibility for Home Confinement

- Per § 603(a) of the First Step Act, amending 34 USC § 60541(g)
- Under control of BOP, not the court
- General rule, per 18 USC § 3624(c)(2) – BOP may direct that final 10% of the full term of the sentence (or 6 months, whichever is shorter) be served in home confinement. Ordinarily, but not always, following a period in halfway house.
- **New law:** BOP may transfer an inmate to home confinement *at any time* if s/he meets stated age-related or health-related criteria

Criteria for Early Home Confinement

- Criteria are set forth in the statute and elaborated in BOP Operations Memorandum 001-2019 (April 4, 2019).
- Criteria fall into two categories:
 - Age-related
 - Health-related.

Health-Related Grounds for Early Release to Home Confinement

1. a. Inmate is in need of nursing home, intermediate care facility, or assisted living; OR
b. Has been diagnosed with a terminal illness** AND
2. Not serving sentence for crime of violence, sex offense, or other excluded offense (the statute contains a long list), nor has past conviction for, or history of, same; AND
3. Release to home confinement will result in a substantial net cost saving to federal government

* Note that inmate will first be considered by BOP for recommendation for RIS. Early transfer to home confinement is a back-up option if RIS is not recommended.

Age-Related Grounds for Early Release to Home Confinement

1. Inmate is at least 60 years old; AND
2. Has served at least 2/3 of sentence imposed, and not serving life sentence; AND
3. Not serving sentence for crime of violence, sex offense, or other excluded offense (the statute has a long list), nor has past conviction for, or history of, same; AND
4. Release to home confinement will result in a substantial net cost saving to federal government.

Reduction in Sentence for “Extraordinary and Compelling Reasons” (a/k/a “compassionate release”)

- Per § 603(b) of the First Step Act, amending 18 USC §3582(c)(1)(A)(i)
- Under control of the court, no longer under exclusive control of BOP (subject to at least a gesture toward exhaustion)
- Statutory rule, per § 3582(c)(1)(A): court may reduce a sentence of imprisonment if – after reconsideration of §3553(a) factors to the extent applicable – it finds reduction is “warranted” for “extraordinary and compelling reasons,” but **only if “consistent with” applicable Policy Statement of U.S. Sentencing Commission**
- Applicable Policy Statement is USSG § 1B1.13

Some key points regarding RIS

- Amended statute requires that inmate (or counsel) may file own motion, but only after (a) exhausting remedies in BOP; *OR* (b) “the lapse of 30 days” after request for BOP to file motion is *received by the warden*, regardless of warden’s action or inaction during 30 days
- Applies to all sentences without exclusion: life sentences, mandatory minimums, sex crimes, violent crimes, etc., are not ineligible, although judge must (per Sentencing Commission statement, arguably contrary to statute) always consider “danger to the community” (see USSG § 1B1.13(2), adopting 18 USC § 3142(g); cf. 18 USC § 3582(c)(1)(A)(ii)).
- That proffered “extraordinary” circumstance was anticipated or foreseeable at time of sentencing is not disqualifying. USSG § 1B1.13 (p.s.), appl. note 2.

Some key points (cont'd)

- Sentencing Reform Act (28 USC §§ 994(a)(1)(C) & 994(t)) *assigned to US Sent Comm'n* the task of defining what “should be considered” to be “extraordinary and compelling circumstances,” to set criteria, and to give examples. Sec 3582(c)(1)(A) requires court to act on motions consistently with these categories and criteria.
- Rehabilitation alone cannot be deemed an “extraordinary and compelling circumstance.” 28 USC § 994(t).
- BOP criteria for whether it will approve RIS request (*i.e.*, recommend that US Atty file motion) are set forth in BOP Prog. Stmt. 5050.50 (Jan. 18, 2019 rev.). But this only governs BOP’s internal decision whether to recommend reduction. BOP criteria have no bearing on *court’s* decisionmaking under § 3582(c). Court rules *de novo*, not a review of BOP’s decision.

Sentencing Commission criteria

Articulated in **USSG § 1B1.13 (p.s.)** and its Application Notes (remember that wording of the statute suggests these are binding on the court)

- Age/time served/health related criteria
- Family circumstances criteria
- “Other” circumstances: Open-ended or BOP controlled? (an unsettled question)

Age/time served/health related criteria

- Within this general category, there are four sets of criteria for eligibility
- Each set of criteria involves a different combination of:
 - Time served
 - Age of inmate
 - Health status
 - Effect of age and/or health condition

First ground: Terminal Illness

- Defined in statute as medical condition with an “end of life trajectory” (§ 3582(d)(1)) – no specific “life expectancy” standard applies
- If inmate has terminal illness, no other consideration matters (time served, age, etc.)

Special procedural rules for BOP in Terminal Illness and disability cases

Congress imposed several specific procedural requirements in new subsection 3583(d) for the benefit of inmates with a terminal illness diagnosis, or who are physically or mentally unable to make their own applications:

- Notify inmate's "attorney, partner, and family" of condition (within 72 hrs if terminal illness), and advise that they may prepare and submit RIS application for inmate
- Upon request of inmate or family, BOP personnel must assist in preparation and submission of request for RIS
- Within 7 days, provide an opportunity for partner and family ("including extended family") to visit, if terminal
- Process request in terminal illness cases within 14 days

Second ground: Reduced ability to provide self-care in prison

- May be based on either “serious medical or physical condition” *or*
- “Serious functional or cognitive impairment”
- From which the inmate is “not expected to recover,” *and which*
- “Substantially diminishes” ability to provide self-care in correctional environment

Third ground: impact of aging

- No minimum age stated, but “because of the aging process” ...
- Inmate is experiencing deteriorating physical or mental health ...
- That substantially diminishes ability to provide self-care in a correctional environment

Fourth ground: Age and time served

- After serving *the lesser of* 10 years or 75% of full term of imprisonment, *and*
- At least 65 years old, *and*
- “because of the aging process” is
- Experiencing **serious** deterioration in physical or mental health, but
- **No particular impact on ability to function in prison is required**

Family circumstances

- a.** Death or incapacitation of caregiver of inmate's minor child or children, **OR**
- b.** Incapacitation of inmate's spouse or "registered partner" where inmate would be that person's only remaining available caregiver.

Other circumstances

- USSC Policy Statement 1B1.13 (last amended in 2016) refers to “Other reasons *as determined by BOP*”
- Is this delegation binding on courts under the “consistent with” clause of § 3582(c)(1)(A) after First Step? Or is it not binding, in light of USSC being presently disabled, for lack of a quorum, from enacting any amendments to react to the 2018 Act? Cf. *US v. LaBonte*, 520 U.S. 751 (1997) (Guidelines that implement a statute must be consistent with the statute).
- Some recent and much-commented-on decisions say courts are no longer limited to BOP’s criteria in defining “other” grounds and may not even be bound by USSC criteria at all: see *US v. Cantu*, 2019 WL 2498923 (S.D.Tex., 6/17/19), and *US v. Beck*, 2019 WL 2716505 (M.D.N.C., 6/28/19); see also *US v. Cantu-Rivera*, 2019 WL 2578272 (S.D.Tex., 6/24/19).

Other circumstances (per BOP)

- Whether or not binding, BOP Prog.Stmt. 5050.50 identifies three criteria beyond those listed by USSC in 1B1.13 (p.s.)
- Two are similar to, but in some ways more stringent (and in other respects, less) than, the third and fourth USSC criteria:

(**Warning for counsel:** Inmates who meet USSC criteria may be denied by BOP in reliance on these discrepancies, but that does not keep you from prevailing in court.)

Other BOP-defined criteria #1

- Age 65 or older, and
- **Has served at least 50% of sentence**, and
- “related to the aging process,” has
- **Chronic or** serious medical conditions for which conventional treatment promises no substantial improvement and
- “deteriorating mental or physical health”
- That substantially diminishes inmate’s **ability to function** in a correctional facility

NOTE: These standards are helpfully elaborated in BOP Operations Memorandum 002-2016.

Other BOP-defined criteria #2

- Age 65 or older, and
- Has served **the greater of** 10 years or 75% of the sentence imposed. (75% will be more than ten years whenever sentence imposed was 160 months or longer.)
- No additional health considerations apply

Other BOP-defined criteria #3

- Age 70 or older, **and**
- Has served 30 years or more
- *No health-related considerations apply*

NOTE: This category should not be confused with similar second-look provision for “three strikes” cases found in § 3582(c)(1)(A)(ii).

In court's ultimate decision whether reduction is "warranted," what 3553(a) factors are "applicable," and how?

- Nature and circumstances of the offense?
- Deterrence, adequate punishment, etc.?
- Unwarranted disparity?
- Need to "provide ... medical care in the most effective manner"
- New consideration of "not greater than necessary"?