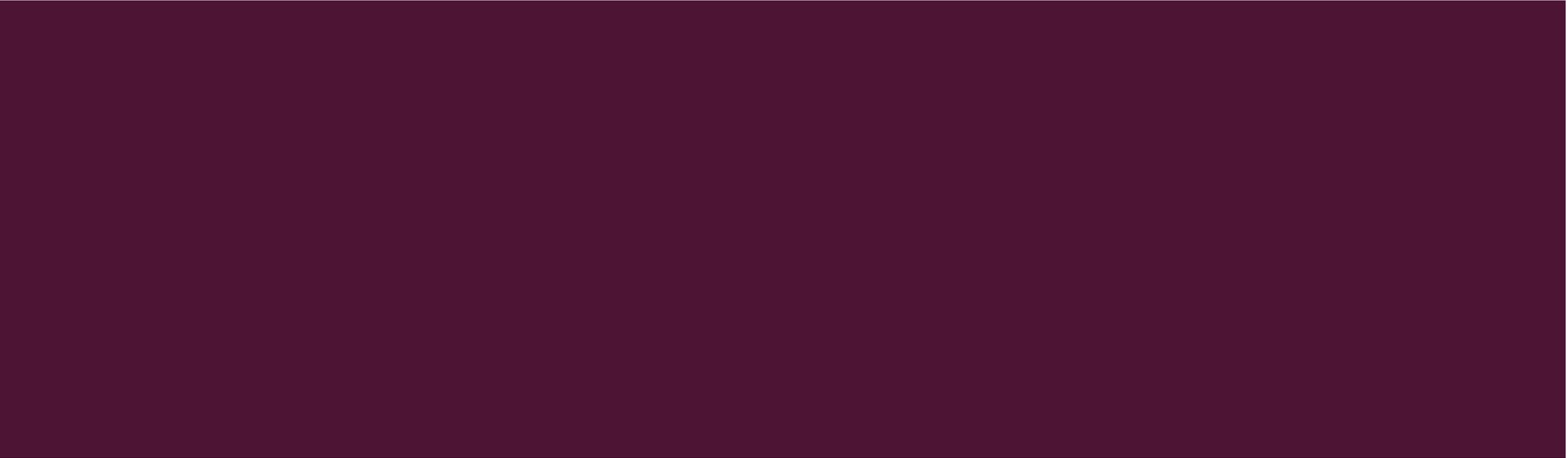




COMPASSIONATE RELEASE: LITIGATION UPDATE

FEDERAL DEFENDERS OF NEW YORK

NOVEMBER 16, 2020



HOUSEKEEPING MATTERS

- You can find the attendance affirmation here: <https://federaldefendersny.org/cja-resources.html>
- Send the completed form to: NYS_CLE@fd.org
- Next week: Federal Trials in the Age of COVID
- Today's Panel: FDNY Appeals attorneys Eunice Lee and Colleen Cassidy
- Focus on recent developments around “extraordinary and compelling reasons” after some background

COMPASSIONATE RELEASE: BACKGROUND

- **18 U.S.C. § 3582(c)(1)(A)** permits a court:
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- “upon motion of the defendant after 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 the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that--
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- **(i)** extraordinary and compelling reasons warrant such a reduction . . .
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- and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission[.]”
- Don't forget the enumerated reasons in the Guidelines and the Program Statement. See May 11, 2020 CLE presentation.

COMPASSIONATE RELEASE: BACKGROUND

- **Roadblocks to winning Compassionate Release:**
 - [1] no “exhaustion”;
 - [2] court cannot impose conditions it deems necessary;
 - [3] section 3553(a) factors do not warrant reduction;
 - [4] no extraordinary and compelling reasons;
 - [5] inconsistent with applicable policy statements;
 - [6] defendant is danger to the safety of any person or to the community, an additional requirement imposed by USSG §1B1.13.

COMPASSIONATE RELEASE: BACKGROUND

- Section 3582(c)(1)(A) gives multiple bites at the apple. It will almost always be faster/more fruitful to regroup and gather more facts and more backup than to appeal.

COMPASSIONATE RELEASE: BACKGROUND

- Exhaustion: Defendant may move the Court after BOP fails to bring a motion for a reduction in sentence or a lapse of 30 days, whichever is earlier.
- Local string cites
- Appeals Courts: 30 day wait is non-jurisdictional, but no equitable exceptions. Must raise extraordinary and compelling reasons in the request to the BOP, but need not exhaust every detail/extraordinary and compelling reason.

COMPASSIONATE RELEASE: BACKGROUND

- Good old 3553(a) factors
- Just like appealing a sentencing on 3553(a) grounds, it's going to be very hard to convince an appeals court that the D. Ct. abused its discretion in balancing the 3553(a) factors.
- One appellate victory: US v. Westine, CA 20-5233 (6th Cir. Aug. 25, 2020) (reversed because D. Ct. did not have opportunity to consider the impact of COVID-19 on BOP's ability to care for terminally ill).
- Almost always going to be better to file a new request with new facts
- If client insists on an appeal, consider appealing as a matter of law (e.g., insufficient statement of reasons, consideration of impermissible factors) as opposed to straight 3553(a) grounds.

EXTRAORDINARY AND COMPELLING REASONS

- Extraordinary and Compelling Reasons: Second Circuit Developments
 - United States v. Brooker, No. 19-3218, 2020 WL 5739712 (2d Cir. Sept. 25, 2020)
 - <https://blog.federaldefendersny.org/second-circuit-holds-that-district-courts-may-grant-compassionate-release-on-expansive-grounds-and-are-not-limited-to-the-sentencing-commissions-criteria/>
 - Gov't Petition for Rehearing
 - Responding to the Gov't's Arguments

QUESTION OF THE DAY

- Can D. Ct. impose a below-mandatory minimum sentence in the first instance on the ground that it would grant Compassionate Release?