

# Compassionate Release and COVID-19

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WHAT TO DO AND HOW TO WIN

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# Compassionate Release

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18 U.S.C. § 3582 provides in relevant part:

**(c) MODIFICATION OF AN IMPOSED TERM OF IMPRISONMENT.**—The court may not modify a term of imprisonment once it has been imposed except that—

**(1)** in any case—

**(A)** the court, upon motion of the Director of the Bureau of Prisons, or 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—

**(i)** extraordinary and compelling reasons warrant such a reduction;

....

and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission[.]

# This is meant to be a safety valve

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The “extraordinary and compelling circumstances” provision of § 3582(c) was originally enacted in 1984.

Designed to create a safety valve for modification of “unusually long sentences” given the abolishment of parole in the federal system.

But until 2018, **only** the BOP could bring such motions.

In 2018, the First Step Act amended the statute – **now inmates can petition the court directly.**

# What constitutes “extraordinary and compelling” circumstances?

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There are two places to start:

The Sentencing Commission articulated enumerated grounds defining what constituted “extraordinary and compelling” circumstances. *See* U.S.S.G. §1B1.13.

BOP program statement 50.50

# The Guidelines

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U.S.S.G. §1B1.13 :

The Court may reduce a term of imprisonment if, after considering the 3553(a) factors, the Court determines that:

(1)(A) Extraordinary and compelling reasons warrant the reduction or

(1)(B) the defendant

(i) is at least 70 years old and

(ii) has served at least 30 years in prison pursuant to a sentence imposed under 18 U.S.C. 3559(c)

(2) The defendant is not a danger to the safety of any other person or the community, as provided in 18 U.S.C. 3142(g) and

(3) The reduction is consistent with this policy statement

# The Guidelines: Extraordinary and Compelling Reasons

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U.S.S.G. §1B1.13, application note 1:

Provided the defendant is not a danger, Extraordinary and Compelling Circumstances exist when:

(A) Medical condition of the Defendant:

(i) terminal illness (no specific prognosis of life expectancy required)

(ii) serious physical or medical condition, serious functional or cognitive impairment, or deteriorating physical or mental health that substantially diminishes the ability of the defendant to provide self-care and no expected recovery

# The Guidelines: Extraordinary and Compelling Reasons

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U.S.S.G. §1B1.13, application note 1:

Provided the defendant is not a danger, Extraordinary and Compelling Circumstances exist when:

(B) Age of the Defendant: at least 65 years old, is experiencing a serious deterioration in physical or mental health because of the aging process and has served at least 10 years or 75 percent of original term of imprisonment

(C) Family circumstances: Death or incapacitation of caregiver of defendant's minor child or the incapacitation of defendant's spouse or partner and the defendant is their only caregiver.

# The Guidelines: Extraordinary and Compelling Reasons

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U.S.S.G. §1B1.13, application note 1:

Provided the defendant is not a danger, Extraordinary and Compelling Circumstances exist when:

(D) Other reasons in addition to or in combination with the above, as determined by the Director of the BOP

The Guidelines have not been amended since the passage of the First Step Act.

This “other reasons” category, combined with the purpose of Compassionate Release and the First Step Act, opens the door for any extraordinary and compelling reason

# The BOP: Extraordinary and Compelling Reasons

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BOP Program statement 50.50

Section 4 of the BOP's program statement expands the age considerations:

At least 65 years old, served 50% of time, and serious health concerns or

At least 65 years old, served 75% of sentence, even without health concerns

At least 70 years old, served 30 or more years.

[https://www.bop.gov/policy/progstat/5050\\_050\\_EN.pdf](https://www.bop.gov/policy/progstat/5050_050_EN.pdf)

# Additional Differences: Extraordinary and Compelling Reasons

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The BOP program statement requires the medical condition to have arisen after sentencing. U.S.S.G. 1B1.13, note 2, specifies that the condition need not have been unforeseen at the time of sentencing.

BOP Program statement requires a release plan, U.S.S.G. 1B1.13 directs Court to apply 3553(a)

# What are these “Other Reasons”?

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- **No limit** on what constitutes “extraordinary and compelling” circumstances
- While the sentencing guidelines delegate authority to the BOP to determine what are sufficiently compelling “other reasons,” **the majority of courts have found that this delegation of authority is no longer persuasive** given passage of the First Step Act
- Importantly, **not limited to issues of health or age or family circumstances**
  - *See, e.g., United States v. Millan*, 91 Crim. 685 (LAP) (S.D.N.Y., April 6, 2020)
- Particularly in the case of vulnerable inmates, **COVID-19 constitutes extraordinary and compelling circumstances**

# Logistics: How do you apply?

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- **Initial request to Warden**
- **Motion to District Court**
  - **Prior to the First Step Act, the motion had to come from BOP. Now, the defendant, or defense attorney, can make the motion in the district court**
  - **When? We'll talk about that in a moment.**

# Logistics: How do you apply?

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- **Initial request to Warden**

- BOP Program statement says “ordinarily” the request has to come from the defendant.
- § 571.61 Initiation of request – extraordinary or compelling circumstances.
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- a. A request for a motion under 18 U.S.C. 4205(g) or 3582(c)(1)(A) shall be submitted to the Warden. Ordinarily, the request shall be in writing, and submitted by the inmate. An inmate may initiate a request for consideration under 18 U.S.C. 4205(g) or 3582(c)(1)(A) only when there are particularly extraordinary or compelling circumstances which could not reasonably have been foreseen by the court at the time of sentencing. The inmate’s request shall at a minimum contain the following information:
  - (1) The extraordinary or compelling circumstances that the inmate believes warrant consideration.
  - (2) Proposed release plans, including where the inmate will reside, how the inmate will support himself/herself, and, if the basis for the request involves the inmate’s health, information on where the inmate will receive medical treatment, and how the inmate will pay for such treatment.
- b. The Bureau of Prisons processes a request made by another person on behalf of an inmate in the same manner as an inmate’s request. Staff shall refer a request received at the Central Office to the Warden of the institution where the inmate is confined.
- A request for a RIS is considered “submitted” for the purposes of 18 USC § 3582(c)(1), when received by the Warden in accordance with this section.

# Logistics: How do you apply?

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- **Initial request to Warden**

BOP Program statement says “ordinarily” the request has to come from the defendant

An attorney can submit the request when the inmate can't

During the COVID-19 emergency, assume no client can request for themselves

Doesn't hurt to double up

# Logistics: How do you apply?

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- **Initial request to Warden**

Email the Warden (and the legal department)

Re: Request for Reduction in Sentence/Compassionate Release

Please accept this request for a reduction in sentence pursuant to 18 U.S.C. § 3582 on behalf of inmate XX YY, Reg. No. XXXXX-XXX. Given the extraordinary and compelling circumstances created by the ongoing coronavirus pandemic, Mr. XX is not able to file this request himself.

Mr. XX seeks a reduction in sentence based on his [debilitated medical condition, elderly with a medical condition, elderly without a medical condition], which places him at significantly greater risk of contracting and/or suffering acutely from COVID-19, according to the Centers for Disease Control.<sup>1</sup> [Briefly describe medical condition/medical history]. Mr. XX's risk is heightened by the particular circumstances at MDC, which presents an ideal situation for COVID-19 to spread. There is already one confirmed positive inmate, and several other inmates are being monitored for symptoms. Mr. XX cannot practice regular hand hygiene, and Mr. XX cannot effectively socially distance himself from other inmates as the CDC cautions every person in the United States to do to stop COVID-19's spread.

If released, Mr. XX can reside with [person] [phone number]. On XX, 2020 [person] confirmed that Mr. XX can reside with [him/her] if released. The address of residence will be [address]. Mr. XX will receive medical treatment at [xx] through Medicaid.

[Additional circumstances – person has served all but xx months of sentence or percentage].

Please inform me of your decision on this request as soon as you can. Thank you for your consideration of this request.

# Logistics: When do you go to court?

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- **30 days elapse with no response from Warden**
- **Exhausted Administrative Review**
- **Right now!**

# EXHAUSTION—Fundamental Argument

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- Not a jurisdictional requirement
- Rather, a non-mandatory claims processing rule subject to equitable exceptions
- Congressional Intent supports this reading
  - *United States v. Haney*, No. 19-CR-541, 2020 WL 1821988 (S.D.N.Y. Apr. 13, 2020) (JSR)
  - *United States v. Russo*, No. 16-CR-441, 2020 WL 1862294 (S.D.N.Y. Apr. 14, 2020) (LJL)
  - *United States v. Scparta*, No. 18-CR-578, 2020 WL 1910481 (S.D.N.Y. Apr. 19, 2020) (AJN)
  - *United States v. Bess*, No. 16-CR-156, 2020 WL 1940809 (W.D.N.Y. Apr. 22, 2020) (LJV)

# Courts are split on the exhaustion issue

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- Court can waive exhaustion: Bolden, Keenan, Liman, Nathan, Rakoff, Ross, Torres, Vitaliano
- Court CANNOT waive exhaustion: Amon, Castel, Engelmayer, Failla, Furman, Karas, Marrero, McMahon, Pauley, Ramos, Schofield, Seibel, Shea, Sullivan, Swain, Wood
- Third Circuit says 30-waiting day period is mandatory: *United States v. Raia*, 954 F.3d 594 (3d Cir. 2020).
  - But petition for rehearing is pending
- Government has appealed the district court's decision in *Bess* to Second Circuit

# Troubleshooting exhaustion

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What if your client is not in a BOP facility?

Go straight to court, as any attempt to exhaust would be futile:

- *United States v. Hernandez*, 18-CR-834 (PAE), 2020 WL 1684062, at \*2 (S.D.N.Y. Apr. 2, 2020) (finding the BOP “structurally incapable of assessing [defendant’s] circumstances . . . because [he] is in the custody of the United States Marshals at a private facility—not in the custody of the BOP,” as the government conceded);
- *United States v. Daly*, 16-CR-281 (PGG) (S.D.N.Y.), ECF No. 861 (government concedes that “the defendant cannot exhaust remedies within the Bureau of Prisons because the defendant is currently in the custody of the United States Marshals Service at a private prison”);
- *United States v. Dana*, 14-CR-405 (JMF) (S.D.N.Y.), ECF No. 107 (government concedes same and waives exhaustion, where defendant was in Orange County jail and BOP advised that he would need to first be transferred back to a BOP facility before he could begin the administrative process)

# Troubleshooting exhaustion

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- What if BOP refuses to accept the petition?
  - Prison mailbox rule should apply:
    - *United States v. Canale*, No. 17-CR-286 (JPO), (S.D.N.Y., April 30, 2020), ECF No. 46 (inmate's papers are deemed filed on the date they are signed and given to the prison official)
    - *United States v. Resnick*, No. 14-CR-810, 2020 WL 1651508 (S.D.N.Y. Apr. 2, 2020) (date inmate hands compassionate release requirement to counselor is operative date for 30-day exhaustion requirement, not date it is received by warden).
  - Can argue futility if request is not even accepted
    - *United States v. Tran*, No. 08-CR-00197-DOC, 2020 WL 1820520 (C.D. Cal. Apr. 10, 2020) (administrative remedies deemed exhausted where BOP case manager refused to accept request for release from inmate).

# Troubleshooting exhaustion

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- What if the original request with the Warden was somehow incomplete?
  - Didn't mention COVID-19?
    - Any request for compassionate release is sufficient:
      - *United States v. Resnick*, No. 14-CR-810-CM, 2020 WL 1651508 (S.D.N.Y. Apr. 2, 2020) (rejecting government's argument that, since defendant's original request to BOP did not include COVID-19 argument, defendant must re-exhaust)<sup>1</sup>
  - Didn't mention compassionate release – just made a request under Barr Memo/CARES Act?
    - Barr Memo says BOP should make use its "various statutory authorities" – compassionate release one such authority.

<sup>1</sup>See, e.g., *United States v. Roberson*, No. 09-CR-139-JRK-BKE, ECF No. 109 (S.D. GA. Apr. 27, 2020) (defendant not required to re-exhaust where he had made earlier request to BOP based on cancer diagnosis; COVID-19 pandemic increased risk identified in previous request); *United States v. Miller*, No. 16-20222-1, 2020 WL 1814084, at \*2 (E.D. Mich. Apr. 9, 2020) ("The COVID-19 pandemic merely accentuates [defendant's] meritorious claims for release."); *United States v. Coker*, No. 14-CR-085, 2020 WL 1877800 (E.D. Tn. Apr. 15, 2020) (defendant's earlier request for relief sufficient to satisfy exhaustion requirement where based on same factors); *United States v. Perdigao*, No. CR 07-103, 2020 WL 1672322 (E.D. La. Apr. 2, 2020) (defendant's request for compassionate release submitted in August 2019 sufficient; not need to re-exhaust specifically citing COVID-19); *United States v. Resnick*, No. 14-CR-810-CM, 2020 WL 1651508 (S.D.N.Y. Apr. 2, 2020) (rejecting government's argument that, since defendant's original request to BOP did not include COVID-19 argument, defendant must re-exhaust); *United States v. Garcia*, No. 95-CR-142, ECF No. 196 (E.D. Wisc. Mar. 27, 2020) (defendant exhausted by submitting request to BOP in 2018; not required to re-exhaust to qualify for relief based on COVID-19).

# Troubleshooting exhaustion

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- What if the BOP actually denies the request?
  - Government argues inmate has to appeal administratively
  - But plain language of statute suggests this argument is wrong
  - Inmates can directly petition the Court for compassionate release so long as:
    - the defendant has fully exhausted all administrative remedies to appeal the BOP's failure to bring a motion, or
    - 30 days has lapsed "from the receipt of such a request by the warden of the defendant's facility,"
    - whichever is earlier.
- 18 U.S.C. § 3582(c)(1)(A)
- Courts have endorsed the plain reading of the statute<sup>1</sup>

<sup>1</sup>*United States v. Haney*, No. 19-CR-541, 2020 WL 1821988 (S.D.N.Y. Apr. 13, 2020); *United States v. Davis*, No. 2:15-CR-20067-SHM, 2019 WL 6898676 (W.D. Tenn. Dec. 18, 2019); *United States v. Eisenberg*, No. 16-CR-157-LM, 2020 WL 1808844 (D.N.H. Apr. 9, 2020); *United States v. Johnson*, No. 4:00-CR-40023, 2020 WL 1434367 (W.D. Ark. Mar. 24, 2020); see also *United States v. Guzman Soto*, No. 18-10086, 2020 WL 1905323 (D. Mass. April 17, 2020).

# Practice Tips - Exhaustion

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- As soon as counsel is involved, send a letter to the email address for the executive assistant to the Warden. These can be found on the BOP website.
- Inmate should file the official BOP forms and pursue formal appeals as a back-up.
- SUPPLEMENT a *pro se* request at your earliest possible opportunity.
- Include in your request:
  - Compassionate release
  - CARES Act transfer to home confinement under 18 U.S.C. § 3624
  - Furlough
  - Release plan: place to go (address must be included), medical care in place, a place to self-quarantine
- Don't wait to file in court!
  - Even if judge will not excuse exhaustion requirements, get motion fully briefed so it can be adjudicated on the 31<sup>st</sup> day.

# How can I get my client's medical records?

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- Difficult process – FOIA request with DOJ Certification of Identity Form
- Inmate can request records and then send to you
- Ask for a Court order
- Ask AUSA
- Look for treatment records or obtain letter from doctor before incarcerated
- Cite to PSR, sentencing transcript
- **Don't wait – File and supplement as you get records**
- <https://federaldefendersny.org/cja-resources.html>

# Medical Records

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- Easiest: Ask the AUSA to get them
- For Compassionate Release:
  - BOP says it is prioritizing requests for people who meet “traditional” compassionate release criteria (terminal, debilitated, elderly with medical conditions, etc.) and who would be especially vulnerable to COVID-19 under CDC guidelines, and have exhausted administrative remedies or for whom the lapse of the 30-day statutory period looms.

# Medical Records

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- Send an email to the BOP legal counsel responsible for the institution where the prisoner is incarcerated.
- In the **subject line write:** “Medical Records (client name and register number).”
- In the **body of the email state:**
  - That your client is either terminally ill or debilitated.
  - That you are seeking medical records for X period.
  - That you have your client’s permission to receive the records you are requesting.
- Attach as complete a COI as you can for your client to sign as well as an email from your client authorizing you to make the request if you can
- Wait a reasonable amount of time
- Forward your email to [BOP-OGC/ExecAssistant~@BOP.gov](mailto:BOP-OGC/ExecAssistant~@BOP.gov)

# What to do if your client tests positive?

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- Keep pursuing – the science is changing daily:
  - The World Health Organization’s Lead Scientist on COVID-19, Dr. Maria Van Kerkhove, found that some recovered COVID-19 patients had “no detectable antibody response,” which leaves short term immunity to a second infection an open question. <https://www.cnbc.com/2020/04/13/who-officials-say-its-unclear-whether-recovered-coronavirus-patients-are-immune-to-second-infection.html>
  - *See, e.g., Op. & Order, United States v. Skelos*, No. 15-Cr-137 (S.D.N.Y. Apr. 24, 2020), ECF No. 522 (defendant transferred to home confinement despite contracting COVID-19 at Otisville.)
- Judge Ross granted release to COVID positive inmate:
  - *United States v. Razzouk*, No. 1:11-CR-430 (E.D.N.Y. Apr. 19, 2020) (granting release to COVID-positive inmate scheduled to be released on April 27 anyway because Otisville failed to protect Razzouk from exposure and there is no reason to think he’ll be safe in quarantine)
- Move for immediate release; would be cruel and unusual to be "treated" by BOP especially given current conditions of confinement
- Use as leverage with BOP: safety of other inmates and staff could be put in jeopardy

# Violent/Serious Offenses

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- Emphasize rehabilitation
  - *See, e.g., United States v. Millan*, No. 91-CR-685 (LAP), 2020 WL 1674058 (S.D.N.Y. Apr. 6, 2020)
- Recalibrate the 3553(a) factors
- Courts have granted release in those cases<sup>1</sup>
  - *United States v. Alberto Pena*, No. 15-CR-551 (AJN), 2020 WL 2301199 (S.D.N.Y. May 8, 2020) (armed home invasion);
  - *United States v. Prado*, No. 13-CR-811 (ALC) (S.D.N.Y. Apr. 30, 2020) (string of burglaries);
  - *United States v. Haynes*, No. 93-CR-1043 (RJD), 2020 WL 1941478 (E.D.N.Y. Apr. 22, 2020) (multiple bank robberies);
  - *United States v. Marks*, No. 03-CR-6033L, 2020 WL 1908911 (W.D.N.Y. Apr. 20, 2020) (drugs and firearms offenses);
  - *United States v. Campagna*, No. 16-CR-78-01 (LGS), 2020 WL 1489829 (S.D.N.Y. Mar. 27, 2020) (firearms trafficking)

<sup>1</sup>*See, e.g., United States v. Bryant*, No. CR 95-202-CCB-3, 2020 WL 2085471, at \*1 (D. Md. Apr. 30, 2020) (several armed bank robberies); *Poulios v. United States*, No. 2:09-CR-109, 2020 WL 1922775 (E.D. Va. Apr. 21, 2020) (bank robbery); *United States v. Hammond*, 2020 WL 1891980 (D.D.C. Apr. 16, 2020) (gunpoint robbery); *United States v. McCarthy*, 2020 WL 1698732 (D. Conn. Apr. 8, 2020) (armed bank robbery); *United States v. Williams*, 3:04-cr-95 (N.D. Fl. Apr. 1, 2020) (armed robbery and brandishing firearm). *See also, e.g., United States v. Curtis*, 2020 WL 1935543 (D.D.C. Apr. 22, 2020) (sex trafficking of minors); *United States v. Copeland*, 2:05-cr-00135 (D.S.C. Mar. 24, 2020)

# COVID-19 is not the only ground for Compassionate Release

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- Look at U.S.S.G. §1B1.13
  - Medical condition (terminal illness, debilitating conditions)
  - Age (over 65, serious deterioration related to age, completed at least 10 years or 75% of sentence)
  - Family circumstances (where a child's caregiver dies or becomes incapacitated)

Look at BOP Program Statement

# This is a powerful statute and motion need not be limited to medical conditions and COVID

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Designed to create a safety valve for modification of “unusually long sentences” given the abolishment of parole in the federal system.

- *United States v. Millan*, No. 91-CR-685 (LAP), 2020 WL 1674058 (S.D.N.Y. Apr. 6, 2020) (granting release to defendant who, without a medical condition, had served nearly 30 years of a life sentence following conviction of CCE as leader of a narcotics ring, based primarily on defendant’s extraordinary rehabilitation and because continuation of incarceration constitutes an unwarranted sentencing disparity)
- *United States v. Haynes*, No. 93-CR-1043 (RJD), 2020 WL 1941478 (E.D.N.Y. Apr. 22, 2020) (granting release to defendant who, without a medical condition, had served 27 years of 46.5 years following convictions of four bank robberies, primarily because 40 of the original 46.5 years was the result of the § 924(c) “stacking,” which had been abolished by the First Step Act, and trial penalty).
- *United States v. Curtis*, No. CR 03-533 (BAH), 2020 WL 1935543 (D.D.C. Apr. 22, 2020) (granting release to defendant, who suffers from multiple sclerosis, “has lost 85% of his vision,” and “spends all of his days confined to an electric wheelchair or bed,” and who had served 17 years of his six concurrent terms of life imprisonment following six convictions of sex-trafficking involving minors, based on not only his medical conditions but his rehabilitation, and the fact that defendant if sentenced today would not have been designated a career offender in light of *Johnson* and would have been subject to lower guidelines)
- *United States v. Redd*, No. 97-CR-00006 (AJT), 2020 WL 1248493 (E.D. Va. Mar. 16, 2020) (granting compassionate release to defendant, without a medical condition, who had served approximately 20 years of a 50-year sentence following convictions of four bank robberies and firearm possession because the 50 years was mostly attributable to the practice of “stacking” under §924(c), which had since been (non-retroactively) eliminated by the First Step Act).

# Other avenues for release?

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Request recommendation from Court pursuant to 18 U.S.C. § 3621(b)

- Transfer to home confinement.

CARES Act eliminated the time limits in 18 U.S.C. § 3624

- Furlough

*United States v. Stahl*, 18 Crim. 694 (RA) (S.D.N.Y., Apr. 10, 2020)

File a habeas petition and seek bail pending resolution of habeas

- *United States v. Nkanga*, 18 Crim. 713 (JMF) (S.D.N.Y., Apr. 7, 2020)

Keep pushing with Warden and other key players at facility

# Resources: Where to Look For Help

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<https://www.fd.org/coronavirus-disease-2019-covid-19/compassionate-release>

<https://www.nacdl.org/content/coronavirusresources>

<https://crlclearinghouse.org/training/>

<https://famm.org/our-work/compassionate-release/>