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COMPASSIONATE RELEASE BASICS FOR FEDERAL DEFENDERS

Stephen R. Sady and Elizabeth G. Daily

Updated January 31, 2019

Under the compassionate release statute, the sentencing judge, upon motion of the Bureau of Prisons, may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent they are applicable, if it finds that "extraordinary and compelling reasons" warrant such a reduction. 18 U.S.C. § 3582(c)(1)(A)(i). For over three decades, the BOP claimed unlimited and unreviewable discretion to refuse to file motions to reduce, no matter how clearly our clients deserved a second look by the sentencing judge. All that has fundamentally changed because, on December 21, 2018, the President signed the First Step Act of 2018 into law. Among other criminal justice reforms, Congress amended § 3582(c)(1)(A)(i) to permit the defense to initiate the request for relief under the compassionate release statute. The sentencing judge now has jurisdiction to consider a defense motion for reduction of sentence under the subsection when "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[.]'' First Step Act of 2018, § 603(b), Pub. L. No. 115-391, 132 Stat. 5194, 5239 (2018).

This introduction to compassionate release litigation has three parts. First, we address the need for appointment of counsel and for cooperation among offices to develop facts and to exhaust administrative remedies. Second, we outline the three

areas to address in any compassionate release motion, which are the "extraordinary and compelling reasons," the application of § 3553(a) factors, and the release plan. Third, we provide some history and resources that may be useful in changing the culture of super-deference to the BOP to a culture of judicial independence, humane sentencing, and fiscal responsibility.

A. Appointment Of Counsel And Inter-Office Cooperation

Without the BOP as the gatekeeper of compassionate release, attorneys will play a critical role in ensuring that our clients with "extraordinary and compelling reasons" for a second look at their sentences are identified and that their cases are properly developed and presented to the courts. Both the Sixth Amendment and the Criminal Justice Act support appointment of counsel for compassionate release consideration. The Supreme Court recognized that the Sixth Amendment right to counsel extends to post-sentencing proceedings related to the underlying judgment in *Mempa v. Rhay*, 389 U.S. 128, 135 (1967). The need for counsel is especially great for folks with physical and mental disabilities, as Justice Ginsburg reasoned in finding a due process right to counsel on appeal in *Halbert v. Michigan*, 545 U.S. 605, 607 (2005) ("Persons in Halbert's situation, many of whom have little education, learning disabilities, and mental impairments, are particularly handicapped as self-representatives."). And the Criminal Justice Act specifically provides that a person who had counsel appointed under the CJA for a felony charge is entitled to be represented at every stage of the proceedings, "including ancillary matters appropriate to the proceedings." 18 U.S.C. § 3006A(c).

For terminally ill prisoners and those "physically or mentally unable to submit a request for a sentence reduction," the First Step Act includes a new notification provision that expressly contemplates our involvement as the defendant's attorney in preparing and submitting compassionate release requests at the administrative level. The new § 3582(d)(2) and (d)(3) require that the BOP, in cases of terminal illness and disability, shall "*notify the defendant's attorney*, partner, and family members that they may prepare and submit" a request for compassionate release on the defendants behalf (emphasis added). And it specifically requires BOP employees, upon request, to assist attorneys and family members with the administrative process of seeking compassionate release in those cases. § 3582(d)(2)(iii) and (d)(3)(iii).

With respect to terminal illnesses especially, the First Step Act now recognizes the need for swift, attorney-assisted action. According to BOP statistics

provided to Congress, the BOP received 3,122 requests for compassionate release between 2014 and 2017, 817 of which involved terminal illness. But the BOP only approved 306 requests in that time frame, taking an average of 141 days to make the approval decision. Eighty-one prisoners died while waiting for the BOP's answer. The new statute defines "terminally ill" as "a disease or condition with an end-of-life trajectory," and it requires the BOP to give notice to the defendant's attorney, partner, and family members "not later than 72 hours after the diagnosis [of terminal illness]." The law goes on to require an opportunity for family visitation with 7 days, and the BOP must process requests based on terminal illness within 14 days.

The need for inter-office coordination is key to effectively and efficiently handling compassionate release. Compassionate release cases usually involve defender offices in two districts: where the sentence was imposed, and where the sentence is being served. In the past, we have focused on the district of confinement because that is where we would file habeas corpus petitions under 28 U.S.C. § 2241 petition trying to compel the filing of a motion. Now that we have a path directly to the sentencing judge, we still need to have client contact, factual development, and work with the BOP in the confinement district prior to filing in the sentencing district. For example, the Oregon office will be assisting any other office with a client at FCI Sheridan who has developed "extraordinary and compelling reasons."

Our assistance with the initial application for compassionate release places us in relatively unfamiliar territory. Indeed, in most cases the initial request should be prepared and presented by our clients themselves, assuming they are able to do so. *See* 28 CFR 571.61 ("Ordinarily, the request shall be in writing, and submitted by the inmate."). But counsel at this stage can still provide essential services to advise clients about the standards of both Program Statement 5050.50 and U.S.S.G. § 1B1.13, and to make sure that all relevant grounds are asserted and, to the extent possible, documented in the request for compassionate release and any ensuing administrative appeal. The more we can assist in assuring our clients' cases are effectively presented, including by formulating appropriate release plans, the greater the likelihood that the sentencing judge will have a BOP-approved motion with which to agree or, at least, an administrative record with all our facts favorable to a sentence reduction. And, of course, the new statute contemplates a direct attorney role in preparing requests for clients who are terminally ill or unable to advocate for themselves.

Under the First Step Act, our clients are required to "fully" exhaust administrative remedies before the defense can file a motion with the sentencing

judge (unless the BOP delays review). Under the current practice, when the warden denies the request, the client must appeal that denial through the normal administrative remedy program in 28 C.F.R. 542 subpart B. Most inmates are familiar with the administrative remedy process, which involves time limits on appeals to the warden, to the regional office, and to the central office. Program Statement 1330.18, *Administrative Remedy Program* (Jan. 6, 2014). However, when the warden makes a favorable recommendation, the packet goes straight to the BOP's General Counsel for review. 28 C.F.R. 571.62. Any denial after that point—by the General Counsel or by the BOP Director—constitutes a "final administrative decision" that an inmate may not appeal through the Administrative Remedy Procedure. 28 C.F.R. § 571.63(d).

Under the First Step Act, a case becomes ripe for filing the defense motion under the statute when "the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf" or after "the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier." Although the latter option is broadly worded, remember that our chances of success are very good when the BOP itself files the motion with the judge, or, barring that, when the administrative record is fully developed. Ordinarily, completing each administrative step is critical to providing the strongest position on the motion before the sentencing judge.

B. Presenting The Sentencing Judge With A § 3582(c)(1)(A)(i) Motion

Once administrative remedies have been exhausted, we can file a motion for reduction of sentence before the sentencing judge. As modified by the First Step Act, § 3582(c)(1)(A) provides:

> [T]he 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[.]

Thus, the statute requires a finding of "extraordinary and compelling reasons," and, additionally, a determination that those reasons "warrant" a sentence reduction after the judge has considered the relevant factors in § 3553(a). We have a suggested outline for a motion attached, but, as with all defender legal writing, pleadings will evolve as we gain more experience with this type of litigation. But we will always need to address at least three basic areas.

1. "Extraordinary And Compelling Reasons"

There are competing standards for "extraordinary and compelling reasons" from the BOP and from the Sentencing Commission, both of which are relevant to compassionate release motions under the First Step Act. In the Sentencing Reform Act of 1984, Congress expressly delegated to the Sentencing Commission the task of defining § 3582(c)(1)(A)(i)'s "extraordinary and compelling reasons" in 28 U.S.C. § 994(t). But until 2007, the Commission failed to do so, leaving the BOP to make up its own criteria, which can be found in Program Statement 5050.50, *Compassionate Release/Reduction in Sentences* (Jan. 17, 2019). In 2016, the Sentencing Commission, based on hearings and comment, expanded the definition of "extraordinary and compelling reasons" and strongly urged the BOP to bring motions for reduction in sentence whenever the prisoner met the Commission's criteria. U.S.S.G. § 1B1.13.

Under the First Step Act, the Commission's 1B1.13 criteria take the leading role. In Application Note 1 of § 1B1.13, the Commission set out categories of qualifying "extraordinary and compelling reasons": (A) "Medical Conditions of the Defendant," including subparagraphs for terminal illness and for other serious conditions that substantially diminish the defendant's ability to provide self-care within the institution; (B) "Age of the Defendant," for those 65 and older with serious deterioration related to aging who have completed at least 10 years or 75 percent of the term of imprisonment; (C) "Family Circumstances," where a child's

caregiver dies or becomes incapacitated or a spouse becomes incapacitated without an alternative caregiver; and (D) "Other Reasons" as defined by the BOP.

This last provision is why we need to make sure we continue to reference the BOP program statement. Under subsection (D), the BOP can add to circumstances that can be considered "extraordinary and compelling reasons." Section 4 of the BOP's program statement sets out different criteria for age-related consideration, including consideration for inmates over age 65 who have served only 50% of their sentence but who have serious health concerns or those who have served the greater of 10 years or 75% of their sentence, even without health concerns. In section 4(a), Program Statement 5050.50 extends consideration to "Inmates sentenced for an offense that occurred on or after November 1, 1987 (e.g., "new law"), who are age 70 years or older and have served 30 years or more of their term of imprisonment." Since Congress delegated the definition only to the Commission, our position is that the BOP can expand but cannot limit the scope of "extraordinary and compelling reasons."

That means that, whenever we are assessing a potential § 3582(c)(1)(A)(i) motion, we will need to review the standards for "extraordinary and compelling reasons" from both the Sentencing Commission in U.S.S.G. § 1B1.13 and the Bureau of Prisons in Program Statement 5050.50. We figure out which of those standards (medical condition, age, family circumstances) apply to our client with a preference for the more generous Guideline criteria. As reflected in the Sentencing Commission's Statement of Reason for Amendment 799 (U.S.S.G. Supp. to App. C at 126 (Nov. 2018)), the 2016 version of § 1B1.13 considered and rejected at least two criteria that are still part of the BOP's stricter standard.

- The BOP program statement requires that the condition upon which the motion is based arose after the initial sentence was imposed, while § 1B1.13's Application Note 2 states, "an extraordinary and compelling reason need not have been unforeseen at the time of sentencing in order to warrant a reduction in the term of imprisonment."

- The BOP program statement requires an approved release plan, while Application Note 4 of § 1B1.13 calls for the sentencing judge to apply the sentencing standards under 18 U.S.C. § 3553(a) and to consider the motion "if the defendant meets any of the circumstances set forth in Application Note 1."

Additionally, for our clients who qualify based on age under Application Note 1(B) of § 1B1.13, we should be sure to count good time credits earned under 18 U.S.C. § 3624(b) when determining whether the client has served 10 years or 75 percent of the term of imprisonment, whichever is less. If the dates are simple, you can just use a Date Duration Calculator to count the days between arrest and the BOP's projected release date (from Inmate Locator on the BOP website), then count the days between arrest and today, then divide the first number into the second for the percentage served. To figure out what an equivalent sentence your client has served with good time credits would be, you can use the chart at this link to add good time to actual time, assuming adjustment for any loss of good time credits.[1]

> **Example**: Your client was arrested on January 1, 2010, and sentenced to a 151 month sentence. His projected release date is December 15, 2020, meaning he will serve a full sentence of 4001 days with good time credit. On February 1, 2019, your client will have served 3318 days, which is equivalent to a 125-month sentence or 83 percent of the sentence imposed.

2. Section 3553(a) Factors And Risk To Others And The Community

Once we have determined what "extraordinary and compelling reasons" support the sentence reduction, the next step is to apply the relevant 18 U.S.C. § 3553(a) factors to explain why release is warranted. This section involves many of the same factors considered and presented at the original sentencing with key additions. Most importantly, the time already served should have met many of the original sentencing goals: the Supreme Court's opinion in *Pepper v. United States*, provides an excellent format for relating post-offense rehabilitation to § 3553(a) factors. 562 U.S. 476, 490-93 (2011). You can file a separate sealed submission with the presentence report, BOP progress report and disciplinary record, and medical reports relevant to your client's condition. Any intervening favorable developments should be included, especially the completion of rehabilitative programming, attempts to pay restitution, evidence of family reconciliation, and actions demonstrating sincere remorse.

[1] https://www.fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/clemency/good-time-chart.pdf

Although danger to the community is considered under § 3553(a)(1)(C) ("to protect the public from further crimes of the defendant"), the Sentencing Commission included as a separate determination that "the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g)." U.S.S.G. § 1B1.13(2). The statutory reference is to the Bail Reform Act, which includes consideration of safety of others and the community: "the nature and seriousness of the danger to any person or the community that would be posed by the person's release." 18 U.S.C. § 3142(g)(4). As in any sentencing presentation, we argue any pertinent factors supporting a low risk of dangerous recidivism, but the "extraordinary and compelling reasons" are likely to provide strong arguments on this question. Especially for those moving under "age of defendant," the statistics on recidivism of prisoners over 65 years old should help neutralize these concerns. *See* United States Sentencing Commission, *The Effects of Aging on Recidivism Among Federal Offenders* (Dec. 2017).

The flip side of potential danger to the community is our clients' vulnerability in prison due to medical "extraordinary and compelling reasons," which are now defendant characteristics under § 3553(a)(1). Even under the mandatory Guidelines system prior to 2005, the Supreme Court recognized that vulnerability in prison constituted a legitimate basis for downward departures. *Koon v. United States*, 518 U.S. 81, 107 (1996) (recognizing susceptibility to abuse in prison as a basis for downward departure) (citing *United States v. Lara*, 905 F.2d 599 (2d Cir. 1990)). Our frail and impaired clients may have a number of vulnerabilities that we will need to develop specific to the "extraordinary and compelling reasons" in the individual case. Clients may have diseases that involve compromised immune systems that make group living and inevitable exposure to contagions especially dangerous for them. Our clients' weakness and the potentially catastrophic consequences of physical attack may be an important consideration. For some conditions such as diabetes, the BOP has, anecdotally, a terrible time providing for appropriate care given the need for constant testing of blood sugar levels, control of diet, and scheduled insulin injections. Where medical considerations need to be explained, we need to develop facts for the sentencing judge using public sources, medical support organizations, and, where appropriate, expert assistance.

The most important consideration under § 3553(a) is the overarching obligation for the sentencing judge to follow the parsimony principle and impose a sentence "sufficient, but not greater than necessary," to accomplish the goals of sentencing. *Dean v. United States*, 137 S. Ct. 1170, 1175 (2017); *Kimbrough v.*

United States, 552 U.S. 85, 101 (2007)). The question for terminally ill clients is whether the judge should impose a life sentence. For our clients, there is a profound difference between facing death in prison surrounded by strangers and being with family and loved ones as death approaches. Our clients have done wrong but the reason for compassionate release, as its name suggests, is to add some degree of humanity to our brutal system. And for those judges more interested in things fiscal, as suggested by the Sentencing Commission in § 5H1.4, the costs of caring for the dying in prison is much higher than when our clients are able to die at home. Beyond our terminally ill clients, we now have explicit recognition by the Sentencing Commission of factors that warrant consideration for shorter sentences based on client characteristics and social history.

3. Modification of Conditions Of Supervised Release To Accommodate The Reasons For The Sentencing Reduction

If your client is fortunate, the BOP will already have approved a release plan that takes into account the extra needs created by the reasons for the sentence reduction. In any event, our experience with clemency, retroactive Guidelines amendments, and collateral attacks on enhanced sentences teaches that the smoothest reentry transitions occur when the BOP, the Probation Office, and defense teams all work together. Our office has designated probation contacts who we alert in advance when a potential compassionate release recipient comes onto our radar. There may be a need for amendments to the conditions of supervised release, including release to the district where supportive family live or temporary release to a reentry center while resources are marshalled to assist the client. The more solid the plan, the better the chances at a sentence reduction; no one wants an ailing and vulnerable client on the street with inadequate resources.

C. Changing The Narrative By Embracing The Historical Shift Accomplished By The First Step Act

For over 30 years, federal defense lawyers have agonized and improvised when clients and their families tell us of developments that make further incarceration inhumane and unreasonable but the BOP refuses to file a motion. For many years, federal defenders have been joining with prisoner support organizations in trying to change what has been a truly awful system by advocating before the Sentencing Commission, in submissions to congressional committees, and by providing comments on BOP regulations. We hope that the BOP will embrace the new legislation and that we are on the cusp of a time when the BOP will be joining

us in many more motions for deserving clients. But if we are in the position of litigation after the BOP has refused compassionate release filing, it is helpful to know the history of litigation that preceded the First Step Act. With that knowledge, advocates can effectively recognize and challenge vestiges of the old regime that should be jettisoned with the congressional changes to compassionate release and encourage judges to embrace their new authority.

Most problematically, sentencing judges may instinctively or deliberately defer to the BOP's judgment to deny compassionate release based on decades of precedent concluding that the BOP has unreviewable authority in that arena. However, federal defenders have argued that the build-up of bad case law on the statute derived from confusion and conflation of the old parole statute 18 U.S.C. § 4205(g), with the compassionate release statute, 18 U.S.C. § 3582(c)(1)(A). Rather than unlimited and unreviewable discretion, § 3582(c)(1)(A) has always provided standards and delegated authority in such a manner that the only legitimate function of the BOP was to assess whether "extraordinary and compelling reasons" existed and, if so, to notify the sentencing judge by filing a motion. Those legal arguments based on the statutes' history and the separation of powers are set out in the linked briefs by federal defenders and the supporting amicus curiae brief of prisoner advocates.[2]

Relatedly, the BOP's program statement on compassionate release continues to require consideration of factors that are properly left for sentencing determination by a judge, such as whether release would minimize the severity of the offense or pose a danger to the community. In our litigation prior to the First Step Act, we asserted that the BOP was usurping a judicial function that the BOP had no business taking on for itself for two reasons. First, § 3582(c)(1)(A)(i) delegates only to the sentencing judge consideration of § 3553(a) factors such as the seriousness of the offense and protection of the community. Second, in the second subparagraph of the statute relating solely to elderly prisoners, Congress expressly included BOP consideration of risk to the community. 18 U.S.C. § 3582(c)(1)(A)(ii) (requiring a determination by the BOP director that the defendant is not a danger under § 3142(g)). The express inclusion in one part of the statute forecloses tacit delegation

[2] http://or.fd.org/system/files/case_docs/Steven%20Avery%20v.%20Justin%20Andrews%20AOB.pdf

http://or.fd.org/system/files/case_docs/Steven%20Avery%20%20FAMM%20amicus.pdf

in the other part. *See Dean v. United States*, 137 S. Ct. 1170, 1177 (2017) ("We have said that '[d]rawing meaning from silence is particularly inappropriate' where 'Congress has shown that it knows how to direct sentencing practices in express terms.'") (quoting *Kimbrough v. United States*, 552 U.S. 85, 103 (2007)).

But the First Step Act's amendment to § 3582(c)(1)(A) clearly reflects the congressional aim to diminish the BOP's control over compassionate release by permitting defendants to file sentence reduction motions directly with the sentencing court. As a matter of policy, the BOP's implementation of § 3582(c)(1)(A)(i) has been a miserable failure. The Department of Justice's Office of the Inspector General has repeatedly found that the program resulted in needless and expensive incarceration and was administered ineffectively. Department of Justice, Office of the Inspector General, *The Federal Bureau of Prisons' Compassionate Release Program*, at 11 (April 2013) ("The BOP does not properly manage the compassionate release program, resulting in inmates who may be eligible candidates for release not being considered."); DOJ, OIG, *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons*, at 51(May 2015) ("Although the BOP has revised its compassionate release policy to expand consideration for early release to aging inmates, which could help mitigate the effects of a growing aging inmate population, few aging inmates have been released under it."). Aside from expense and inefficiency, the human costs of incarceration that no longer serves the purposes of sentencing have been documented by prisoner advocates. Human Rights Watch & Families Against Mandatory Minimums, *The Answer Is No: Too Little Compassionate Release in US Federal Prisons* (Nov. 2012); Mary Price, *A Case For Compassion*, 21 Fed. Sent. Rptr. 170 (Feb. 2009); Stephen Sady & Lynn Deffebach, *Second Look Resentencing Under 18 U.S.C. § 3582(c) As An Example Of Bureau Of Prisons Policies That Result In Overincarceration*, 21 Fed. Sent. Rptr. 167 (Feb. 2009).

When we are filing compassionate release motions, we are not asking the judge to review the BOP's decision. The statutory responsibility to decide whether a motion to reduce should be granted falls solely to the court, not the BOP. Decisions about sentencing "[should] not be left to employees of the same Department of Justice that conducts the prosecution." *Setser v. United States*, 566 U.S. 231, 242 (2012); *see also id.* at 240 ("[T]he Bureau is not charged with applying § 3553(a)."). Only the court is charged with considering the "extraordinary and compelling reasons," then evaluating whether the sentencing factors under § 3553(a) warrant a reduction in sentence.

Conclusion

We just received an important addition to our job description: making sure deserving clients receive a serious and compassionate second look at the sentence they are serving when "extraordinary and compelling reasons" exist. We will often be helping clients and their families during distressing and traumatic times. While making sure our legal arguments take full advantage of the new law, we will also be marshalling investigators, social workers, and alternatives specialists to present our clients' cases and to provide the best community resources, including hospice services, for effective release plans. The First Step Act left much undone, but we should be making sure our clients receive the full benefits from what has been given.

[Attorney information]

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON
****File in the criminal case docket in the district of sentencing.****
****Make sure to search and replace for gendered pronouns if necessary.****

UNITED STATES OF AMERICA,	**Case No. _____**
Plaintiff,	
v.	**MOTION TO REDUCE SENTENCE PURSUANT TO 18 U.S.C. § 3582(c)(1)(A)(i)**
[CLIENT],	
Defendant.	

Introduction

The defendant, CLIENT, through his attorneys, respectfully moves this Court pursuant to the newly-amended 18 U.S.C. § 3582(c)(1)(A)(i) for an order reducing his sentence to time served based on [describe terminal illness]. CLIENT's [terminal illness] satisfies the "extraordinary and compelling reasons" standard under § 3582(c)(1)(A)(i), as elaborated by the Sentencing Commission in U.S.S.G. § 1B1.13. After considering the applicable factors set forth in 18 U.S.C. § 3553(a), we respectfully request that the Court reduce CLIENT's sentence to time served and modify the terms of supervised release to accommodate his probation-approved release plan.

Jurisdiction

On December 21, 2018, the President signed the First Step Act into law. Among the criminal justice reforms, Congress amended 18 U.S.C. § 3582(c)(1)(A)(i) to provide the sentencing judge jurisdiction to consider a defense motion for reduction of sentence based on extraordinary and compelling reasons whenever "the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf," or after "the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier[.]" First Step Act of 2018, § 603(b), Pub. L. 115-391, 132 Stat. 5194, 5239 (Dec. 21, 2018). In this case, CLIENT has fully exhausted his administrative remedies within the Bureau of Prisons. [Describe the steps leading to exhaustion following Program Statement 5050.50, and attach the denial as an exhibit. A denial by the warden must be appealed through the normal administrative remedy program. If the warden approves the request, but it is denied by the BOP's General Counsel or the BOP Director, that denial constitutes a "final administrative decision," 28 C.F.R. § 571.63(d), that satisfies exhaustion. CAUTION: If you are relying on the lapse of 30 days without exhaustion, make sure to explain why there is a need to proceed directly to court.]

Sentence Reduction Authority Under 18 U.S.C. § 3582(c)(1)(A)(i)

This Court has discretion to reduce the term of imprisonment imposed in this case based on § 3582(c)(1)(A)(i), which states in relevant part that the Court "may reduce the term of imprisonment, after considering the factors set forth in [18 U.S.C. §] 3553(a) to the extent they are applicable, if it finds that . . . extraordinary and compelling reasons warrant such a reduction . . . and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission[.]" In 28 U.S.C. § 994(t), Congress delegated to the Sentencing Commission the

authority to "describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples." As relevant here, the examples of "extraordinary and compelling reasons" in U.S.S.G. § 1B1.13 include a terminal illness, regardless of life expectancy:

> The defendant is suffering from a terminal illness (i.e., a serious and advanced illness with an end of life trajectory). A specific prognosis of life expectancy (i.e., a probability of death within a specific time period) is not required. Examples include metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced dementia.

U.S.S.G. § 1B1.13, comment. n.1(A)(i). The Commission's standard has parallels under the Bureau of Prisons (BOP) program statement on compassionate release PS 5050.50, *Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582 and 4205(g)*, at 4 (Jan. 17, 2019) (providing compassionate release consideration for inmates with a terminal medical condition and noting that functional impairment is not required for compassionate release when an inmate's diagnoses is terminal). The BOP's program statement remains relevant only to the extent that its criteria are broader than the standards set by the Commission. U.S.S.G. § 1B1.13, comment. n. 1(D) (recognizing that the Director of the BOP can designate additional "extraordinary and compelling reason other than, or in combination with, the reasons described in" the commentary).

[Add any other potentially relevant considerations, such as age and length of sentence served, noting whether they are in § 1B1.13 or the BOP program statement.]

Relevant Facts and Procedural History

On DATE, CLIENT was sentenced to ** months in prison upon his [plea of guilty to] [conviction after trial of] [offense(s)]. [Include relevant sentencing facts such as statutory range, guideline range, any favorable post-sentencing law changes that client did not benefit from (such

as no longer a career offender, drug guideline lower), age at time of offense, any health factors or other mitigation taken into account at the time of sentencing, and specifically noting if there were no health problems at sentencing.]

CLIENT has been in custody in connection with the present offenses since his arrest on DATE, which amounts to ** months of actual incarceration. Counting good time credits earned, he has served the equivalent of a **-month sentence. [Describe good conduct in prison, if possible, including employment, participation in programming, satisfaction of financial obligations.]

During the service of the sentence [describe how the illness was discovered and when it was determined to be terminal, including any predictions of life expectancy.] [Note that this addresses the common scenario we see; adjust as necessary:] With assistance from prison personnel, CLIENT submitted a request for compassionate release. Although the request was approved by the Warden of his institution, it was denied by the BOP General Counsel on DATE, and the BOP refused to file a motion for sentence reduction. Applying the BOP's program statement, which is not referenced in § 3582(c)(1)(A)(i) or § 1B1.13, the BOP agreed that CLIENT's terminal condition qualifies as an "extraordinary and compelling reason" for a sentence reduction, but denied the request based on its assessment of factors related to public safety and its determination that a sentence reduction would minimize the seriousness of CLIENT's offense:

[insert language of denial]

Because the General Counsel's denial is a final administrative decision, CLIENT has no pathway for further administrative remedy.

Argument

A. CLIENT's Terminal Illness Constitutes An Extraordinary And Compelling Reason That Warrants A Sentence Reduction.

Under U.S.S.G. § 1B1.13, commentary note 1(A), extraordinary and compelling reasons for a sentence reduction exist when "[t]he defendant is suffering from a terminal illness (*i.e.*, a serious and advanced illness with an end of life trajectory." CLIENT satisfies this simple criteria.

[Briefly summarize the terminal illness and life expectancy.]

Under the present statutory regime, the existence of extraordinary and compelling circumstances confers on this Court the authority to consider the relevant 18 U.S.C. § 3553(a) factors and determine whether the circumstances warrant a sentence reduction.

This Court should not give weight to the BOP's compassionate release denial because it was based solely on sentencing-related factors better left to the Court's discretion. The statutory responsibility to decide whether a motion to reduce should be granted falls to this Court, not the BOP. Decisions about sentencing "[should] not be left to employees of the same Department of Justice that conducts the prosecution." *Setser v. United States*, 566 U.S. 231, 242 (2012); *see also id.* at 240 ("[T]he Bureau is not charged with applying § 3553(a)."). Here, the BOP recognized that CLIENT's [terminal illness] is an extraordinary and compelling reason that triggers sentence reduction eligibility. Under § 3582(c)(1)(A) and § 1B.13, it is the Court, not the BOP, that is charged with considering the "extraordinary and compelling reasons," then evaluating whether the sentencing factors under § 3553(a)—including public safety under the standard in 18 U.S.C. § 3142(g)—warrants a reduction in sentence.

The First Step Act's amendment to § 3582(c)(1)(A) reflects the congressional aim to diminish the BOP's control over compassionate release by permitting defendants to file sentence

reduction motions directly with the sentencing court. The BOP's administration of the compassionate release program has long been the subject of criticism. The Department of Justice's Office of the Inspector General has repeatedly found that the program results in needless and expensive incarceration and is administered ineffectively. Department of Justice, Office of the Inspector General, *The Federal Bureau of Prisons' Compassionate Release Program*, at 11 (April 2013) ("The BOP does not properly manage the compassionate release program, resulting in inmates who may be eligible candidates for release not being considered."); Department of Justice, Office of the Inspector General, *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons*, at 51 (May 2015) ("Although the BOP has revised its compassionate release policy to expand consideration for early release to aging inmates, which could help mitigate the effects of a growing aging inmate population, few aging inmates have been released under it."). Aside from the expense and inefficiency, the human costs of the BOP's stinting view of compassionate release has been documented by prisoner advocates. Human Rights Watch & Families Against Mandatory Minimums, *The Answer Is No: Too Little Compassionate Release in US Federal Prisons* (Nov. 2012).

[NOTE: The BOP's denials are often factually inaccurate or fail to follow the BOP's own program statement. Make sure to point out any such errors.]

With the enactment of the First Step Act, the authority shifts to this Court to decide whether the undisputed extraordinary and compelling reasons warrant a sentence reduction in this case without deference to any administrative agency.

B. With Full Consideration Of The § 3553(a) Factors, CLIENT's Time Served Constitutes A Sentence Sufficient But Not Greater Than Necessary To Accomplish The Goals Of Sentencing.

Under all of the circumstances in this case, the COURT should conclude that the time that CLIENT has already served is sufficient to satisfy the purposes of sentencing. Under *Pepper v. United States*, 562 U.S. 476, 490-93 (2011), the Court can, and indeed must, consider post-offense developments under § 3553(a), which provides "the most up-to-date picture" of the defendant's history and characteristics and "sheds light on the likelihood that [the defendant] will engage in future criminal conduct." *Id.* at 492.

Here, the overriding factor under § 3553(a) that was not present at the time of sentencing is CLIENT's terminal illness. Although the circumstances of the present offense and CLIENT's criminal history qualified him for the serious sentence that this Court originally imposed, CLIENT's health at the time of sentencing provided no indication that the sentence would be, in effect, a sentence to die in prison.

As recognized in the Sentencing Commission's policy statement on physical condition, extraordinary impairments provide reasons for downward departures for "seriously infirm" defendants, including to home detention at initial sentencing "as efficient as, and less costly than, imprisonment." U.S.S.G. § 5H1.4; *see also* 18 U.S.C. § 3553(a)(2)(D) (consideration of providing needed medical care in the most effective manner). CLIENT's physical and mental condition following his terminal diagnosis realistically forecloses a probability of dangerous recidivism. Further, at ** years old, CLIENT's age places him in the class of prisoners least likely to recidivate. United States Sentencing Commission, *The Effects of Aging on Recidivism Among Federal Offenders* (December 2017). Having undergone a very long period of incarceration, and having

experienced physical and mental deterioration, CLIENT does not constitute a danger to any other person or to the community.

[ADD any other relevant § 3553(a) factors, including good institutional conduct.]

The Court should conclude that the ___-month sentence already served has sufficiently met the purposes of sentencing after considering CLIENT's extraordinary and compelling circumstances.

C. The Conditions Of Supervised Release Should Be Modified To Accommodate The Reasons For The Sentencing Reduction.

CLIENT has formulated a solid release plan with the assistance of the Probation Office during the administrative compassionate release proceedings. The plan involves [describe, especially addressing how medical needs will be met]. Accordingly, if the Court grants this motion, we would ask the Court to impose [condition(s)] as an added condition of supervised release.

Conclusion

For the foregoing reasons, CLIENT respectfully requests that the Court grant reduction in sentence to time served and amend the conditions of supervised release as requested.

Respectfully submitted this _____ day of _____, 2019.

*/s/*_____
**
Attorney for Defendant

[Attorney information]

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON
****File in the criminal case docket in the district of sentencing.****
****Make sure to search and replace for gendered pronouns if necessary.****

UNITED STATES OF AMERICA,	**Case No. _____**
Plaintiff,	
v.	**MOTION TO REDUCE SENTENCE PURSUANT TO 18 U.S.C. § 3582(c)(1)(A)(i)**
[CLIENT],	
Defendant.	

Introduction

The defendant, CLIENT, through his attorneys, respectfully moves this Court pursuant to the newly-amended 18 U.S.C. § 3582(c)(1)(A)(i) for an order reducing his sentence to time served based on [these references are to 1B1.13 commentary; use any that apply—1A: his poor [physical] [mental] health and difficulty taking care of himself in prison; 1B: his age, health concerns, and the time he has already served; 1C his tragic family circumstances]. CLIENT's circumstances satisfy the "extraordinary and compelling reasons" standard under § 3582(c)(1)(A)(i), as elaborated by the Sentencing Commission in U.S.S.G. § 1B1.13. After considering the applicable factors set forth in 18 U.S.C. § 3553(a), we respectfully request that the Court reduce CLIENT's

sentence to time served and modify the terms of supervised release to accommodate his probation-approved release plan.

Jurisdiction

On December 21, 2018, the President signed the First Step Act into law. Among the criminal justice reforms, Congress amended 18 U.S.C. § 3582(c)(1)(A)(i) to provide the sentencing judge jurisdiction to consider a defense motion for reduction of sentence based on extraordinary and compelling reasons whenever "the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf," or after "the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier[.]" First Step Act of 2018, § 603(b), Pub. L. 115-391, 132 Stat. 5194, 5239 (Dec. 21, 2018). In this case, CLIENT has fully exhausted his administrative remedies within the Bureau of Prisons. [Describe the steps leading to exhaustion following Program Statement 5050.50, and attach the denial as an exhibit. A denial by the warden must be appealed through the normal administrative remedy program. If the warden approves the request, but it is denied by the BOP's General Counsel or the BOP Director, that denial constitutes a "final administrative decision," 28 C.F.R. § 571.63(d), that satisfies exhaustion. CAUTION: If you are relying on the lapse of 30 days without exhaustion, make sure to explain why there is a need to proceed directly to court.]

Sentence Reduction Authority Under 18 U.S.C. § 3582(c)(1)(A)(i)

This Court has discretion to reduce the term of imprisonment imposed in this case based on § 3582(c)(1)(A)(i), which states in relevant part that the Court "may reduce the term of imprisonment, after considering the factors set forth in [18 U.S.C. §] 3553(a) to the extent they are applicable, if it finds that . . . extraordinary and compelling reasons warrant such a reduction . . .

and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission[.]" In 28 U.S.C. § 994(t), Congress delegated to the Sentencing Commission the authority to "describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples." As relevant here, the examples of "extraordinary and compelling reasons" in U.S.S.G. § 1B1.13 include CLIENT's circumstances:

> [Include any potentially relevant consideration. For example, your client might have a serious physical or medical condition under n.1(A)(ii)(I) and also meet the age-related and length of time served criteria. The impairment requirement applies to all of note 1(A), but it does not apply to the age-related criteria in 1(B).]:
>
> [(ii) The defendant is--
>
> (I) suffering from a serious physical or medical condition,
>
> (II) suffering from a serious functional or cognitive impairment, or
>
> (III) experiencing deteriorating physical or mental health because of the aging process,
>
> that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.]
>
> [(B) Age of the Defendant.--The defendant (i) is at least 65 years old; (ii) is experiencing a serious deterioration in physical or mental health because of the aging process; and (iii) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.]
>
> [(C) Family Circumstances.--
>
> (i) The death or incapacitation of the caregiver of the defendant's minor child or minor children.
>
> (ii) The incapacitation of the defendant's spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner.]

U.S.S.G. § 1B1.13, comment. n.1(**). The Commission's standard has parallels under the Bureau of Prisons (BOP) program statement on compassionate release PS 5050.50, *Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582 and 4205(g)*, at ** (Jan. 17, 2019) (providing compassionate release consideration for inmates with **). Under the First Step Act, the BOP's program statement retains relevance only to the extent that its criteria are broader than the standards set by the Commission. U.S.S.G. § 1B1.13, comment. n. 1(D) (recognizing that the Director of the BOP can designate additional "extraordinary and compelling reason other than, or in combination with, the reasons described in" the commentary).

Relevant Facts and Procedural History

On DATE, CLIENT was sentenced to ** months in prison upon his [plea of guilty to] [conviction after trial of] [offense(s)]. [Include relevant sentencing facts such as statutory range, guideline range, any favorable post-sentencing law changes that client did not benefit from (such as no longer a career offender, drug guideline lower), age at time of offense, any health factors or other mitigation taken into account at the time of sentencing, and specifically noting if there were no health problems at sentencing. Note that § 1B1.13 n.2 specifically states that an extraordinary and compelling reason "need not have been unforeseen at the time of sentencing in order to warrant a reduction in the term of imprisonment." But an unforeseen circumstance will ordinarily be more persuasive.]

CLIENT has been in custody in connection with the present offenses since his arrest on DATE, which amounts to ** months of actual incarceration. Counting good time credits earned, he has served the equivalent of a **-month sentence. [Describe good conduct in prison, including employment, participation in programming, satisfaction of financial obligations.]

During the service of the sentence [describe how the circumstances that support compassionate release arose.] [Note that this addresses the common scenario we see; adjust as necessary:] With assistance from prison personnel, CLIENT submitted a request for compassionate release. Although the request was approved by the Warden of his institution, it was denied by the BOP General Counsel on DATE, and the BOP refused to file a motion for sentence reduction. Applying the BOP's program statement, which is not referenced in § 3582(c)(1)(A)(i) or § 1B1.13, the BOP agreed that CLIENT's condition qualifies as an "extraordinary and compelling reason" for a sentence reduction, but denied the request based on its assessment of factors related to public safety and its determination that a sentence reduction would minimize the seriousness of CLIENT's offense:

[insert language of denial]

Because the General Counsel's denial is a final administrative decision, CLIENT has no pathway for further administrative remedy.

Argument

A. CLIENT Has Established Extraordinary And Compelling Reasons That Warrants A Sentence Reduction.

Under U.S.S.G. § 1B1.13, commentary note 1(**), extraordinary and compelling reasons for a sentence reduction exist when "[fill in from standards quoted above]." CLIENT satisfies this simple criteria.

[Explain how circumstances meet criteria. If under 1(A) for physical or mental condition, make sure to describe how the condition limits the defendant's ability to provide self care in the institution. Note that the BOP often claims no functional limitation because the defendant is not

officially asking for assistance with activities of daily living, but we generally learn that our clients are actually relying on other inmates for help on a regular basis.]

Under the present statutory regime, the existence of extraordinary and compelling circumstances confers on this Court the authority to consider the relevant 18 U.S.C. § 3553(a) factors and determine whether the circumstances warrant a sentence reduction.

This Court should not give weight to the BOP's compassionate release denial because it was based solely on sentencing-related factors better left to the Court's discretion. The statutory responsibility to decide whether a motion to reduce should be granted falls to this Court, not the BOP. Decisions about sentencing "[should] not be left to employees of the same Department of Justice that conducts the prosecution." *Setser v. United States*, 566 U.S. 231, 242 (2012); *see also id.* at 240 ("[T]he Bureau is not charged with applying § 3553(a)."). Here, the BOP recognized that CLIENT's circumstances present an extraordinary and compelling reason that triggers sentence reduction eligibility. Under § 3582(c)(1)(A) and § 1B.13, it is the Court, not the BOP, that is charged with considering the "extraordinary and compelling reasons," then evaluating whether the sentencing factors under § 3553(a)—including public safety under the standard in 18 U.S.C. § 3142(g)—warrants a reduction in sentence.

The First Step Act's amendment to § 3582(c)(1)(A) reflects the congressional aim to diminish the BOP's control over compassionate release by permitting defendants to file sentence reduction motions directly with the sentencing court. The BOP's administration of the compassionate release program has long been the subject of criticism. The Department of Justice's Office of the Inspector General has repeatedly found that the program results in needless and expensive incarceration and is administered ineffectively. Department of Justice, Office of the Inspector General, *The Federal Bureau of Prisons' Compassionate Release Program*, at 11 (April

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[NOTE: The BOP's denials are often factually inaccurate or fail to follow the BOP's own program statement. Make sure to point out any such errors.]

With the enactment of the First Step Act, the authority shifts to this Court to decide whether the undisputed extraordinary and compelling reasons warrant a sentence reduction in this case without deference to any administrative agency.

B. With Full Consideration Of The § 3553(a) Factors, CLIENT's Time Served Constitutes A Sentence Sufficient But Not Greater Than Necessary To Accomplish The Goals Of Sentencing.

Under all of the circumstances in this case, the COURT should conclude that the time that CLIENT has already served is sufficient to satisfy the purposes of sentencing. Under *Pepper v. United States*, 562 U.S. 476, 490-93 (2011), the Court can, and indeed must, consider post-offense developments under § 3553(a), which provides "the most up-to-date picture" of the defendant's history and characteristics and "sheds light on the likelihood that [the defendant] will engage in future criminal conduct." *Id.* at 492.

Here, the Commission's policy statement recognizes that CLIENT's circumstances are "extraordinary and compelling," which should weigh heavily in the sentencing equation. Although the circumstances of the present offense and CLIENT's criminal history qualified him for the serious sentence that this Court originally imposed, [discuss changed circumstances and argue any relevant 3553(a) factors].

[If relevant: As recognized in the Sentencing Commission's policy statement on physical condition, extraordinary impairments provide reasons for downward departures for "seriously infirm" defendants, including to home detention at initial sentencing "as efficient as, and less costly than, imprisonment." U.S.S.G. § 5H1.4; *see also* 18 U.S.C. § 3553(a)(2)(D) (consideration of providing needed medical care in the most effective manner). CLIENT's physical and mental condition following his health decline realistically forecloses a probability of dangerous recidivism. Further, at ** years old, CLIENT's age places him in the class of prisoners least likely to recidivate. United States Sentencing Commission, *The Effects of Aging on Recidivism Among Federal Offenders* (December 2017). Having undergone a very long period of incarceration, and having experienced physical and mental deterioration, CLIENT does not constitute a danger to any other person or to the community.]

[Address good institutional conduct and readiness for release.]

The Court should conclude that the ___-month sentence already served has sufficiently met the purposes of sentencing after considering CLIENT's extraordinary and compelling circumstances.

C. The Conditions Of Supervised Release Should Be Modified To Accommodate The Reasons For The Sentencing Reduction.

CLIENT has formulated a solid release plan with the assistance of the Probation Office during the administrative compassionate release proceedings. The plan involves [describe, especially addressing how medical needs will be met]. Accordingly, if the Court grants this motion, we would ask the Court to impose [condition(s)] as an added condition of supervised release.

Conclusion

For the foregoing reasons, CLIENT respectfully requests that the Court grant reduction in sentence to time served and amend the conditions of supervised release as requested.

Respectfully submitted this _____ day of _____, 2019.

*/s/*_____
**
Attorney for Defendant