

Pandemic Is Changing Compassionate Release Calculus

By **Jamie Furia and Carly Coleman** (January 14, 2021)

The risk of becoming infected with COVID-19 while incarcerated is significant and widely documented in the U.S. On Thursday, the Federal Bureau of Prisons reported that 4,718 federal inmates and 2,049 bureau staff members nationwide have tested positive for the disease, 38,535 inmates have recovered, and 190 inmates have died.[1]

As the disease continues to wreak havoc on the prison system, it also has had far-reaching collateral consequences in influencing federal sentencing decisions.

On March 26, 2020, then U.S. Attorney General William Barr issued a memorandum directing the bureau to prioritize "statutory authorities to grant home confinement for inmates seeking transfer in connection with the ongoing COVID-19 pandemic."[2]

And on April 3, Barr released another memorandum directing bureau officials to "immediately maximize appropriate transfers to home confinement" and consider "all at-risk inmates — not only those who were previously eligible for transfer."[3]

Since March, federal district courts have fielded an influx of requests to reduce sentences for incarcerated defendants and to delay the start of prison terms for voluntary surrender defendants. These requests include an unusually high volume of applications for compassionate release, a procedure established under the Sentencing Reform Act of 1984 through which defendants seek early or immediate release from custody.

Even in nonpandemic times, federal judges engage in a highly fact-intensive analysis to determine whether reducing a defendant's prison term is appropriate under the compassionate release framework.

To prevail on such an application, a defendant must first exhaust his or her administrative remedies with the bureau[4] and then demonstrate to a district court that (1) extraordinary and compelling reasons warrant a sentencing reduction[5] and (2) applicable sentencing factors are satisfied.[6]

The reduction must also be consistent with U.S. Sentencing Commission policy statements.[7]

This article will explore how the COVID-19 pandemic has affected the compassionate release analytical framework for white collar defendants. First, a disclaimer is in order: COVID-19-related compassionate release outcomes vary greatly, both because they are so fact-dependent and, now, because the precise timing of the decision matters with COVID-19 statistics that change daily.

Thus, rather than aim to thread the data points under a single umbrella, this article focuses on the key factual determinants in the recent and evolving body of case law. The article then concludes with a discussion about the possible future of compassionate release beyond



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the pandemic.

Extraordinary and Compelling Standard During the COVID-19 Crisis

COVID-19 has presented a nearly perfect backdrop for compassionate release applicants. Applicants seek to satisfy the extraordinary and compelling standard by demonstrating that they suffer from one or more of the many chronic medical conditions that would increase the likelihood of severe illness if they were to become infected. Generally, courts require proof of such medical conditions and "more than mere speculative risk of exposure to the virus at the prison where the inmate is housed."^[8]

Separately, under the applicable Sentencing Commission policy statement, a defendant may also rely on age and family circumstances to satisfy the extraordinary and compelling standard.^[9] The nature of the underlying crime, however, is not directly relevant to this analysis.

Some, but not all, courts have shown a willingness to accept a defendant's asserted medical condition as truth, perhaps due to the contagious, unpredictable and possibly severe nature of COVID-19.

For example, in *U.S. v. Kolodesh*, a judge in the U.S. District Court for the Eastern District of Pennsylvania stated that he would assume without deciding that the defendant suffered from heart disease and obesity as purported in his application.^[10] The court found these medical conditions to be extraordinary and the fact that the defendant would not be expected to recover if he contracted COVID-19 to be compelling.^[11]

Courts are relying on the U.S. Centers for Disease Control and Prevention as the authority on which underlying conditions are linked to severe COVID-19 illness; however, suffering from any such condition does not automatically satisfy the extraordinary and compelling standard.

For example, in *U.S. v. Marley*, a judge in the U.S. District Court for the Southern District of New York did not find extraordinary and compelling grounds for a defendant who suffered from hypertension and chronic kidney disease, even though the court recognized that the CDC lists both as health conditions that could cause more severe illness from COVID-19 and despite documented outbreaks at the defendant's correctional facility.^[12]

The court noted that the defendant, who had not yet served the mandatory minimum sentence for his crimes, including a drug distribution conspiracy, had already contracted and recovered from COVID-19, and, in the court's view, he would likely receive a vaccine before becoming susceptible to reinfection.^[13]

Even when a defendant not previously infected with COVID-19 demonstrates comorbidities, courts may nonetheless find a lack of extraordinary and compelling reasons when there have been few or no confirmed cases of the virus at the defendant's particular correctional facility.^[14] In making these determinations, courts rely on the BOP's daily reporting of the number of confirmed cases and deaths in each prison.^[15]

Some courts have acknowledged the potential limitations of this information, such as a lack of availability of diagnostic testing within facilities and the rapid, unpredictable rate at which the virus can spread.^[16]

Analysis Under the Sentencing Guidelines

A compassionate release applicant also bears the burden of showing that the relief sought would comport with the sentencing factors delineated in Title 18 of the U.S. Code, Section 3553(a). The most commonly emphasized Section 3553(a) factors in the COVID-19 compassionate release case law are (1) the nature and circumstances of the underlying offense and (2) the need for the sentence imposed to punish, deter, protect the public and reflect the seriousness of the offense.

In the white collar context, courts assess the nature and severity of a crime by examining, among other things, the dollar amount of the crime and the defendant's degree of sophistication in committing the crime. For example, in *U.S. v. Nehmad*, a Southern District of New York judge denied a compassionate release application brought by a defendant who was convicted of "an elaborate five-years-long scheme to defraud the Mexican government out of over \$20,000,000." [17]

The court also grounded its decision in the fact that while the 59-year-old defendant asserted that he suffered from hernias, sciatica, prediabetes and depression, the CDC did not identify any of these as COVID-19 comorbidities. And the court made a point of noting that the defendant had only served 30 months of his 75-month sentence. [18]

Deterrence remains a critical judicial consideration in sentencing decisions. [19] In *U.S. v. Yurek*, a judge in the U.S. District Court for the District of Colorado expressed concern that unless a prison sentence is imposed and completed, would-be perpetrators may form "the impression that [economic crimes] are punishable only by a small fine that can be written off as a cost of doing business." [20]

That judge denied a compassionate release application of a defendant who had engaged in a \$1 million tax evasion scheme and falsified court documents. Apart from the deterrence issue, the court commented on the lack of evidence that any individuals — inmates or staff — at the defendant's detention facility had tested positive for COVID-19. [21]

Federal courts are more routinely ordering home confinement as a sentencing alternative for white collar defendants. For example, the U.S. District Court for the Eastern District of Michigan ordered that a 65-year-old defendant, who suffered from numerous COVID-19 comorbidities — heart disease, hypertension, diabetes and asthma — and had been convicted of nonviolent fraud offenses, serve a term of home confinement for a period equal to the balance of his remaining custodial term. [22]

And in a recent U.S. District Court for the District of Massachusetts decision, the court granted early release and ordered the two-year home confinement of a 67-year-old former Boston local government aide who was convicted of bribery, grounding its decision on the defendant's age, health and potential COVID-19 exposure at his correctional facility. [23]

Under the Sentencing Commission's policy statement, whether home confinement is appropriate depends in part on whether the defendant currently presents any danger to the community. [24] Because white collar crimes are nonviolent by nature, courts may be more inclined to find that reducing one's period of incarceration for such a crime, particularly when it is followed by a term of home confinement or supervised release, would not present any danger to the public.

This seems to be especially true in the COVID-19 context. For example, the Eastern District of Pennsylvania granted compassionate release for a 53-year-old who suffered from obesity and hypertension — despite the seriousness of his underlying crime, a sophisticated

mortgage fraud conspiracy causing millions of dollars in losses to lenders.[25] The court reasoned that the defendant no longer posed a danger to the community, as his crimes occurred over a decade ago and, despite the consequences, were not violent in nature.[26]

Is the End in Sight?

With the arrival of the COVID-19 vaccine and a limited number of prison staff and high-risk inmates at certain prisons already having been vaccinated,[27] courts may be less inclined to continue down the current path of favorably deciding compassionate release applications. Other courts, however, are likely to continue granting such applications while the defendants await inoculation, or at least until greater proportions of the prison population are inoculated.

In the Dec. 17 U.S. v. Brown opinion, a judge in the U.S. District Court for the Eastern District of Wisconsin reduced the sentence of a 50-year-old who was convicted of securities fraud and suffered from a multitude of serious health conditions, because "[w]hile the arrival of a vaccine provides hope that the end of the pandemic is in sight, it is unclear when prisoners might be eligible for vaccination." [28]

Yet, just a week earlier, in U.S. v. Kosinski a judge in the U.S. District Court for the District of Connecticut had expressed confidence that a self-surrender date of March 31, 2021, would provide ample time for the 73-year old defendant, who was convicted of drug trafficking to avail himself of the COVID-19 vaccine based on his age.[29]

As a judge in the U.S. District Court for the District of Maryland remarked, COVID-19 is not a get-out-of-jail-free card.[30] Still, the ongoing global health crisis has expanded the use and applicability of compassionate release in a way that may outlive the pandemic.

Whereas compassionate release applications had been rare before the current pandemic, courts may now approach these applications with greater, or more natural, leniency to reduce sentences or to impose sentencing alternatives in the appropriate circumstances, and some may thus apply an improved, and more compassionate, understanding in future cases, even in a post-COVID-19 era.

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[1] BOP, COVID-19 Coronavirus (updated daily), <https://www.bop.gov/coronavirus/> (last accessed Jan. 14, 2021). See also The Marshall Project, A State-by-State Look at Coronavirus in Prisons, <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons> (last updated Jan. 7, 2021). It is also well recognized that correctional facilities are inadequately equipped to contain the spread of contagious disease and that inmates are thus particularly vulnerable to COVID-19 outbreaks. See, e.g., *United States v. Nazzari*, 466 F. Supp. 3d 753, 757 (E.D. Mich. 2020) ("The CDC noted that many detention conditions create a heightened risk [for] detainees. These include: low capacity for patient volume, insufficient quarantine space, insufficient on-site medical staff, highly

congregational environments, inability of most patients to leave the facility, and limited ability of incarcerated/detained persons to exercise effective disease prevention measures (e.g., social distancing and frequent handwashing).") (quoting *United States v. Kennedy* , No. 18-20315, 449 F. Supp. 3d 713, 715–16 (E.D. Mich. Mar. 27, 2020)).

[2] Memorandum from the Attorney General to the Director of Bureau of Prisons, dated Mar. 26, 2020, available at <https://www.justice.gov/file/1262731/download> (last visited Jan. 7, 2021).

[3] Memorandum from the Attorney General to the Director of Bureau of Prisons, dated Apr. 3, 2020, available at <https://www.justice.gov/file/1266661/download> (last visited Jan. 7, 2021). Barr issued this memorandum following the enactment of the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act), which suspended limitations on the allowable length of a home confinement period during the national public health emergency. See Pub. L. No. 116-136, § 12003(b). Prior to the CARES Act, inmates were only eligible for home confinement for 10 percent of the prison term or six months, whichever was shorter. 18 U.S.C. § 3642.

[4] 18 U.S.C. § 3582(c)(1)(A).

[5] *Id.*

[6] 18 U.S.C. § 3553(a).

[7] See, e.g., *United States v. Fleck* , No. 15-cr-00300-DAD-BAM, 2020 WL 6875579, at *2 (E.D. Cal. Nov. 23, 2020); *United States v. Ludwig* , No. 214CR00043KJMKJN1, 2020 WL 4547347, at *3 (E.D. Cal. Aug. 6, 2020).

[8] *United States v. Phillips* , Crim. A. No. 09-718, 2020 WL 5076753 at *3 (E.D. Pa. Aug. 27, 2020).

[9] U.S.S.G. § 1B1.13 cmt. n.1.

[10] *U.S. v. Kolodesh* , CR 11-00464-1, 2020 WL 5292145, at *2 (E.D. Pa. Sept. 4, 2020) (citing *United States v. Spivey* , No. 10-00059-01, 471 F. Supp. 3d 621, 2020 WL 3828600, at *2 (E.D. Pa. July 8, 2020)).

[11] *Id.* at *2. However, the court ultimately denied the application after considering the § 3553 sentencing factors, in light of the fact that the defendant was convicted of a multi-million dollar healthcare fraud and had served less than half of his 176-month prison sentence.

[12] *United States v. Marley* , 16-CR-374 (VEC), 2020 WL 7768406, at *1 (S.D.N.Y. Dec. 30, 2020). The defendant's age was not discussed in the opinion.

[13] *Id.* at *2 (citing *United States v. Delorbe-Luna* , No. 18-CR-384, 2020 WL 7231060, at *2 (S.D.N.Y. Dec. 7, 2020); *United States v. Randolph* , No. 14-CR-476-13, 2020 WL 7647197, at *1 (S.D.N.Y. Dec. 23, 2020); *United States v. Shrout* , No. 15-CR-438, 2020 WL 3483703, at *4 (D. Or. June 26, 2020)).

[14] See, e.g., *United States v. Yurek* , No. 15-CR-394-WJM-1, 2020 WL 3415371, at *2 (D. Colo. June 22, 2020) (citing *United States v. Raia* , 954 F.3d 594, 597 (3d Cir. 2020)).

[15] BOP, COVID-19 Coronavirus (updated daily), <https://www.bop.gov/coronavirus/> (last accessed Jan. 7, 2021).

[16] See, e.g., *United States v. Nazzal*, 466 F. Supp. 3d 753, 758 (E.D. Mich. 2020) ("[I]t is worth noting that the government has not produced any credible information to place the number of detected infections at [a federal prison in Michigan] into context, e.g., by disclosing the number of tests performed to date, or convincingly to demonstrate that the outbreak has abated . . ."). In addition, on December 22, 2020, BOP reported 20 positive COVID-19 inmate cases at Fort Dix, a low-security prison in central New Jersey; on December 28, 2020, less than a week later, that figure soared to 295. BOP, COVID-19 Coronavirus (updated daily), <https://www.bop.gov/coronavirus/> (last accessed Jan. 7, 2021).

[17] *U.S. v. Nehmad*, 16 CR. 829 (AKH), 2020 WL 4586798, at *2 (S.D.N.Y. Aug. 10, 2020).

[18] *Id.* (citing CDC, People of Any Age with Underlying Medical Conditions, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fgroups-at-higher-risk.html (last visited Aug. 7, 2020)).

[19] *Yurek*, 2020 WL 3415371, at *1 (citing *United States v. Morgan*, 635 F. App'x 423, 450 (10th Cir. 2015)).

[20] *Id.* (quoting S. Rep. No. 98-225, at 76 (1983)). See also *United States v. Martin*, 455 F.3d 1227, 1240 (11th Cir. 2006) (explaining that general deterrence may be more effective against carefully calculated economic and fraud-based crimes rather than sudden, passionate, or opportunistic crimes). See also *Kolodesh*, 2020 WL 5292145, at *2; *United States v. Edwards*, 595 F.3d 1004, 1021 (9th Cir. 2010) (Bea, J., concurring in part and dissenting in part).

[21] *Yurek*, 2020 WL 3415371, at *2. See also *United States v. McKee*, No. 18-219 (PAM), 2020 WL 5269969, at *2 (D. Minn. Sept. 4, 2020).

[22] *United States v. Nazzal*, 466 F. Supp. 3d 753 (E.D. Mich. 2020) (also noting that defendant had already served nearly 70 percent of his 110-month custodial sentence). See also *United States v. Walker*, No. 11-CR-381 (SRN/HB), 2020 WL 4194677 (D. Minn. June 26, 2020); *Woodard v. United States*, 469 F. Supp. 3d 499 (E.D. Va. 2020).

[23] *U.S. v. Lynch*, 1:19-cr-10319 (D. Mass. Jan. 5, 2021).

[24] U.S.S.G. § 1B1.13(2).

[25] *United States v. Brown*, No. CR 13-176-4, 2020 WL 6146620, at *1 (E.D. Pa. Oct. 20, 2020).

[26] *Id.*

[27] Michael Balsamo, Reversing course, feds say some US inmates get virus vaccine. Associated Press, <https://apnews.com/article/coronavirus-pandemic-prisons-d2c1a3013351ed42cf75a194e4661cf3> (Dec. 22, 2020). BOP has started to make vaccines available only to prison staff or to certain higher-risk inmates, and only at a limited group of

facilities. Id. BOP has not provided specific information as to how many staff or inmates have received the vaccine thus far or when others can expect to receive it. See also BOP, COVID-19 Vaccine Guidance (Jan. 4, 2021), https://www.bop.gov/resources/pdfs/2021_covid19_vaccine.pdf.

[28] United States v. Brown, No. 06-CR-327, 2020 WL 7401617, at *7 (E.D. Wis. Dec. 17, 2020).

[29]. United States v. Kosinski , No. 16-CR-00148 (VLB), 2020 WL 7263287 (D. Conn. Dec. 10, 2020).

[30] United States v. Harris , No. CR ELH-02-0381, 2020 WL 7828771, at *10 (D. Md. Dec. 30, 2020) (citing United States v. Williams , PWG-13-544, 2020 WL 1434130, at *3 (D. Md. Mar. 24, 2020)).