



## **D.C. COMPASSIONATE RELEASE LAW PROVIDED PARITY AND A CRITICAL PATHWAY BACK TO THE COMMUNITY FOR ELIGIBLE INCARCERATED RESIDENTS**

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On April 7, 2020, the Council of the District of Columbia voted to enact D.C. Act 23-286, the COVID -19 Response Supplemental Emergency Act of 2020. Section 305 of the bill created a new medium by which people convicted and sentenced to incarceration under the D.C. Code could seek compassionate release, modeled on analogous provisions of the federal First Step Act amendments adopted by the U.S. Congress in 2018. The permanent version of the bill was enacted as Title XII of D.C. Law 23-274 Omnibus Public Safety and Justice Amendment Act of 2020 on April 27, 2021 (codified at D.C. Code § 24-403.04). This brief paper offers legal analysis alongside quantitative data to examine the implementation and impact of the law in affording people incarcerated for D.C. Code offenses a means to secure early release from incarceration that did not previously exist except at the sole discretion of officials of the Federal Bureau of Prisons (BOP).

This paper will address the emergence of the law and its specific features, and then briefly focus on the law in operation and evidence of the results yielded by its application thus far. It will ultimately be emphasized that without the 2020 law, incarcerated persons in D.C. had no feasible path to obtaining compassionate release.

### **I. D.C. Code § 24-403.04 – Origin and Content**

As one element of a broader initiative to reform the criminal justice system by decreasing mass incarceration, the U.S. Criminal Code was amended in 2018 under the First Step Act to allow persons who are federally incarcerated to seek compassionate release from imprisonment

through reduction of their criminal sentences under certain circumstances by bringing an action in the same court and in the same case in which they were originally convicted and sentenced. Prior to 2018, compassionate release was obtainable only at the request of an individual who was incarcerated and subsequent motion by the Director of the BOP on their behalf.

Pursuant to the First Step Act amendments in 2018, federal courts can modify an incarcerated person's sentence upon motion of the BOP or upon motion of the person themselves (subject to prior exhaustion of administrative remedies) if "extraordinary and compelling circumstances" warrant the reduction, the movant meets certain age and/or infirmity criteria, and the reduction is determined to be consistent with (or not in contravention of) the U.S. Sentencing Commission's sentencing guidelines and policy statements.<sup>1</sup>

In the first year of enactment, the broadening of federal incarcerated persons' opportunity to seek and obtain compassionate release almost certainly had significantly less impact than criminal justice reform advocates had hoped. During the first year that the First Step Act was in effect, only 107 incarcerated persons "received 'compassionate release' sentence reductions."<sup>2</sup> However, the emergence of the COVID-19 pandemic in early 2020 made very apparent the risk of catastrophic health impacts posed by the virus for prison populations. The First Step Act was thus employed as a mechanism by which thousands of aged or infirm incarcerated persons particularly vulnerable to contracting coronavirus could obtain release from congregate correctional settings, which resulted in a rapid and exponential increase in the number of compassionate release cases brought in the federal courts.

The spotlight directed by the emerging pandemic upon the plight of the incarcerated in general triggered a special focus on the part of members of the D.C. Council on the

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<sup>1</sup> See generally, 18 U.S.C. § 3582(c)(1)(A).

<sup>2</sup> The Sentencing Project, *One Year After the First Step Act: Mixed Outcomes* at 1 (Dec. 2019).

circumstances confronted by those imprisoned within the BOP based solely on their status as individuals convicted and sentenced in D.C. Superior Court for felony violations of the local criminal laws. All such incarcerated persons are diverted to the federal correctional system to serve their time due to the provisions of the 1997 Revitalization Act transferring the custody of local felony offenders from the D.C. Department of Corrections (DOC) to the custody of the BOP.

Unlike the vast majority of BOP detainees, who are convicted in federal court on the basis of offenses violating provisions of the U.S. Criminal Code, as to whom there is no question that compassionate release may be sought under the First Step Act amendments to 18 U.S.C. § 3582(c)(1)(A), D.C. incarcerated persons in the BOP may fall into one of two categories. They may have committed felonies under both the U.S. Code and the D.C. Code, and been prosecuted, convicted and sentenced by the U.S. District Court for the District of Columbia pursuant to D.C. Code § 11-502(3) – permitting that Court to address and decide cases involving criminal prosecutions under both federal and local law in a single case. Alternatively, they may have committed felonies only under local law and been prosecuted, convicted and sentenced in the D.C. Superior Court, but then transferred to the BOP pursuant to the Revitalization Act. In either instance, the U.S. Department of Justice initially took the position that compassionate release could not be sought or obtained under Section 3582(c)(1)(A) by a federally incarcerated person convicted and sentenced for a D.C. Code offense.

Ultimately, the U.S. District Court for the District of Columbia held that Section 3582(c)(1)(A) applies as an avenue for compassionate release in cases involving persons who were convicted, in a single federal case, of both federal and D.C. felony offenses.<sup>3</sup> However,

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<sup>3</sup> See, e.g., *U.S. v. Hammond*, Crim. Action No. 020-294, 2020 WL 1891980, at \*8 (D.D.C. April 16, 2020) (Howell Ch. J.) (rejecting the government’s argument that D.C. incarcerated persons convicted and sentence by the federal

incarcerated persons in BOP custody solely on the basis of felony crimes for which they were charged, convicted, and sentenced solely under local law in the D.C. Superior Court were left “in limbo” *vis-à-vis* compassionate release, without an applicable federal law and subject to a local law allowing such relief only in instances in which the motion was initiated “by the Director of the Federal Bureau of Prisons.”<sup>4</sup>

To fill this void, under the emergency circumstances created by the pandemic, the D.C. Council acted, adopting the local law now codified at D.C. Code § 24-403.04, which provides as follows:

“(a) Notwithstanding any other provision of law, the court may modify a term of imprisonment imposed upon a defendant if it determines the defendant is not a danger to the safety of any other person or the community, pursuant to the factors to be considered in 18 U.S.C. §§ 3142(g) and 3552(a) and evidence of the defendant’s rehabilitation while incarcerated, and;

- (1) The defendant has a terminal illness, which means a disease or condition with an end-of-life trajectory;
- (2) The defendant is 60 years of age or older and has served at least 25 years in prison; or
- (3) Other extraordinary and compelling reasons warrant such a modification, including:
  - (A) A debilitating medical condition involving an incurable, progressive illness, or a debilitating injury from which the defendant will not recover;
  - (B) Elderly age, defined as a defendant who is:
    - (i) 60 years of age or older;
    - (ii) Has served at least 20 years in prison or has served the greater of 10 years or 75% of their sentence; and

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district court in a single proceeding under D.C. Code § 11-502(3) for felonies under both federal law and the D.C. Code are ineligible for compassionate release under 18 U.S.C. § (c)(1)(A); “the federal compassionate release law is better read as a procedural mechanism that applies to all sentences imposed by federal courts. Defendant’s motion is thus properly filed and this Court, having imposed a sentence for violations of both the U.S. Code and the D.C. Code, has the authority to grant defendant relief under 18 U.S.C. § 3582 as to both.”).

<sup>4</sup> See *Hammond*, 2020 WL 1891980, at \*6, citing D.C. Code § 24-468.

(iii) Suffers from a chronic or serious medical condition related to the aging process or that causes an acute vulnerability to severe medical complications or death as a result of COVID-19;

(C) Death or incapacitation of the family member caregiver of the defendant's children; or

(D) Incapacitation of a spouse or a domestic partner when the defendant would be the only available caregiver for the spouse or domestic partner.

(b) Motions brought pursuant to this section may be brought by the U.S. Attorney's Office for the District of Columbia, the Bureau of Prisons, the United States Parole Commission, or the defendant.

(c) Although a hearing is not required, in order to provide for timely review of a motion made pursuant to this section and at the request of counsel for the defendant, the court may waive the appearance of a defendant currently held in the custody of the Bureau of Prisons.”

Although originally adopted as emergency legislation (effective for no longer than 90 days) and then temporary legislation (effective for no longer than 225 days), the D.C. Council subsequently acted to make Section 24-403.04 permanent in April 2021.<sup>5</sup> This local law has thus left no room for doubt that people convicted of D.C. Code offenses and sentenced in the Superior Court have the same right as all other incarcerated persons in the custody of the BOP to seek compassionate release, and D.C. incarcerated persons have unquestionably sought to fully avail themselves of that opportunity.

#### **D.C. Code § 24-403.04 in Practical Application**

The enactment of Section 24-403.04 has provided eligible D.C. incarcerated persons a viable pathway to securing compassionate release that, for practical purposes, simply did not exist under D.C. Code § 24-468.

Data obtained by the Council for Court Excellence (CCE) from the BOP pursuant to a Freedom of Information Act request shows that from February 2017 to August 2020, there were

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<sup>5</sup> D.C. Law 23-274, Title XII, § 1203(b) (adopted April 27, 2021).

241 requests for compassionate release made by BOP incarcerated persons whose offense violated D.C. Code. As of the time BOP responded to CCE in June 2021, a few of these requests remained open awaiting disposition. Several others were either withdrawn (8), or terminated due to the death of the requesting incarcerated person (2); of the 208 requests that were ruled on, *all were denied*. This disheartening statistic encompassed 110 requests based upon medical concerns, including 13 cases involving terminal illnesses (*e.g.*, cancer, AIDS, kidney failure) with estimated life expectancies ranging from 18 months to as little as three (3) months.

This disproportionate number of denials is mirrored by a broader set of data focused upon compassionate release requests by federal incarcerated persons generally under 18 U.S.C. § 3528 (c)(1)(A) during the period January 1, 2020 through June 30, 2021.<sup>6</sup> During that 18-month period encompassing the height of the pandemic thus far, a total of 20,565 compassionate release motions were made in the federal courts, with 3,608 (17.5%) granted and 16,957 (82.5%) denied. Significantly, of the 3,608 motions granted, only 126 were either initiated by BOP (32) or made jointly by the applicant and the BOP (94) – a mere 3.5% of the total.<sup>7</sup> Clearly, BOP has not embraced the First Step Act amendments or been an ally in the efforts of the incarcerated to avail themselves of the opportunity to obtain early release based on advanced age, infirmity (or both), or other “extraordinary and compelling circumstances” demonstrated to the satisfaction of the federal courts.

As a result, it is apparent that, but for the D.C. Council’s action in passing D.C. Code § 24-403.04, D.C. incarcerated persons would, as a practical matter, have *no access* to a means for seeking early release that is available to other incarcerated persons. Data provided by the

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<sup>6</sup> See U.S. Sentencing Comm’n, *Compassionate Release Data Report*, Calendar Years 2020 to 2022 (Sept. 2022), available at <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20220908-Compassionate-Release.pdf>.

<sup>7</sup> *Id.*, Table 4, Origin of Granted Motions for Compassionate Release.

D.C. Superior Court shows that of 126 compassionate release motions ruled upon by its judges during the period of March 16 to September 1, 2020, 31 motions were granted.<sup>8</sup> From January 1 through October 9, 2021, another 188 compassionate release motions were decided and 39 were granted in whole (38) or in part (1).<sup>9</sup> The success rate of around 23% reflected by these figures compares favorably with the 17.5% grant rate achieved in the federal court as reviewed above.

Clearly, Section 24-403.04 has provided D.C. incarcerated persons in the custody of the BOP with a critically important opportunity to be considered for early release that must be preserved. It ensures parity with other people incarcerated in federal facilities and around the country, and provides due process and individualized consideration for individuals with health vulnerabilities.

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*No judicial member of CCE participated in the formulation or approval of this report. This report's findings and characterizations do not reflect the specific views of or endorsement by any judicial member of CCE.*

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<sup>8</sup> See Compassionate Release Motions Data obtained from D.C. Superior Court for the period March 16, 2020 to September 1, 2020.

<sup>9</sup> See Compassionate Release Motions Data obtained from D.C. Superior Court for the period January 1, 2021 to October 9, 2021.