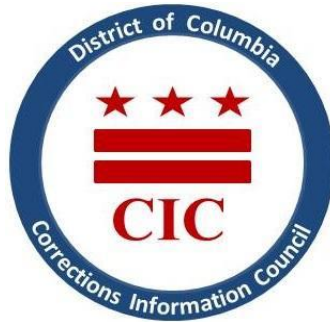


District of Columbia Corrections Information Council



Thematic Report:

The Implementation of DC Code 24-403.04 Motions for Compassionate Release As of September 14, 2020

September 30, 2020



District of Columbia Corrections Information Council

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About the District of Columbia Corrections Information Council

The District of Columbia Corrections Information Council (CIC) is an independent oversight body mandated by the United States Congress and the Council of the District of Columbia to inspect, monitor, and report on the conditions of confinement in correctional facilities where residents from the District of Columbia are incarcerated. This includes facilities operated by the Federal Bureau of Prisons (BOP), the District of Columbia Department of Corrections (DOC), and private contractors.

The CIC reports its observations and recommendations to the District of Columbia Representative in the United States Congress, the Mayor of the District of Columbia, the Council of the District of Columbia, the District of Columbia Deputy Mayor for Public Safety and Justice, the Director of the BOP, the Director of the DOC, and the community.

Although the CIC does not handle individual complaints or provide legal representation or advice, individuals are still encouraged to contact the CIC. Reports, concerns, and general information from incarcerated DC residents and the public are very important to the CIC, and they greatly inform our inspection schedule, recommendations, and reports. However, unless expressly permitted by the individuals or required by law, names and identifying information of residents, corrections staff not in leadership, and members of the general public will be kept anonymous and confidential.

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Introduction

On April 7, 2020, the DC Council passed emergency legislation which expanded the eligibility of DC Code Offenders to apply to the Superior Court for compassionate release. In assessing applications, judges must consider a myriad of factors. While age and medical care levels are not exhaustive of these factors, 272 of DC Code offenders currently in the Federal Bureau of Prisons (BOP) are age 60 and above, and eighty-two (82) are coded as medical care level 3 and level 4.

As of August 18, 2020, two hundred and forty-eight (248) cases had been filed in Superior Court. Of those, one hundred and four (104) cases have been decided. Of those, twenty-nine (29) persons had been granted compassionate release as a result of the new legislation. As of September 14th, the filings increased to three hundred and fourteen (314), and the number of decided cases grew to one hundred and thirty-three (133). In total to date, thirty-eight (38) persons have been granted compassionate release.

Data is being collected by Superior Court about the age, length of sentence, and medical conditions noted in each motion. However, the data must also address answer key questions about the extent and relevance of rehabilitative programming, which is needed to counterweight the perceived dangerousness of the individual based on the seriousness and nature of the original offense. Motions for compassionate release are guided by the following parameters:

§ 24-403.04. Motions for compassionate release for individuals convicted of felony offenses.

(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 3553(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:

(i) Is 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 his or her sentence; and

(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 United States 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, 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.

(d) For the purposes of this section, the term "COVID-19" means the disease caused by the novel 2019 coronavirus SARS-CoV-2.

In accordance with § 24–403.04, the following factors are also considered under U.S.C. § 3142(g):¹

- (1)** the nature and circumstances of the offense charged, including whether the offense is a crime of violence, a violation of section 1591, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device;
- (2)** the weight of the evidence against the person;
- (3)** the history and characteristics of the person, including—
 - (A)** the person’s character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and
 - (B)** whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and
- (4)** the nature and seriousness of the danger to any person or the community that would be posed by the person’s release. In considering the conditions of release described in subsection (c)(1)(B)(xi) or (c)(1)(B)(xii) of this section, the judicial officer may upon his own motion, or shall upon the motion of the Government, conduct an inquiry into the source of the property to be designated for potential forfeiture or offered as collateral to secure a bond, and shall decline to accept the designation, or the use as collateral, of property that, because of its source, will not reasonably assure the appearance of the person as required.

¹ Available at <https://www.law.cornell.edu/uscode/text/18/3142>.

Additional factors to be considered under U.S.C. § 3553(a), as directed by § 24–403.04, are as follows:²

- (1)** the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2)** the need for the sentence imposed—
 - (A)** to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B)** to afford adequate deterrence to criminal conduct;
 - (C)** to protect the public from further crimes of the defendant; and
 - (D)** to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3)** the kinds of sentences available;
- (4)** the kinds of sentence and the sentencing range established for—
 - (A)** the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
 - (i)** issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
 - (ii)** that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or
 - (B)** in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);
- (5)** any pertinent policy statement—
 - (A)** issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
 - (B)** that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[1]
- (6)** the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7)** the need to provide restitution to any victims of the offense.

² Available at <https://www.law.cornell.edu/uscode/text/18/3553>.

I. Key Participants for Implementation

Soon after the passage of the legislation, the Washington Lawyers' Committee, the Public Defender Service for the District of Columbia, the National Association of Criminal Defense Lawyers, and several organizations coordinated to provide information about the new legislation, and create the DC Compassionate Release Clearinghouse to assign volunteer attorneys to persons deemed eligible to apply for compassionate release. The DC Corrections Information Council (CIC) mailed copies of the informational materials to every DC Code offender in the custody of the Federal Bureau of Prisons (BOP), which explained the revised legislation and the process for contacting the Clearinghouse. The Clearinghouse facilitated the initial process of screening applicants for eligibility consistent with compassionate release criteria. The Clearinghouse also hosts a web based system of tracking applications:
<https://circularclearinghouse.org/applicants/applicantrecord>.

Superior Court, which had been hearing pro se and other applications for sentence reconsiderations, created procedures for responding to and tracking cases created by the new legislation. Pro bono attorneys, the US Attorney's Office for the District of Columbia (USAO), and approximately 60 sitting judges have also expended time and effort on the execution of the legislation. There was an initial sense of urgency that has now been replaced with structures for sustainability. Protocols have been developed by the courts, and training materials, including model pleadings, are available for pro bono attorneys.

The BOP relays applicants' personal records to the USAO³ and - subsequently, to counsel handling the cases for applicants.⁴ While the files are not exhaustive (*infra*), records are retrieved more efficiently since each attorney representing a compassionate release candidate does not have to seek all documents directly from the BOP. Processes for informing BOP residents of the legislation, screening questionnaires, assigning lawyers, and filing cases are progressing. Procedures are continuing to evolve as the volume of applications increases.

Another area of collaboration is the role of local organizations and agencies in seeking re-entry resources (*infra*). While some of the collaborations are undergirded by a formal Memorandum of Understanding, much of the cooperation and collaboration relies on existing informal relationships.

II. Recruiting & Training Professionals and Tracking Requests

Approximately 600-700 prisoners have contacted the DC Compassionate Release Clearinghouse seeking legal assistance. Of these, approximately 300 have been filed. Of the more than 600 cases, the DC Public Defender Service is handling close to 100 cases, which leaves a great need for Pro Bono and Criminal Justice Act (CJA) lawyers. The Compassionate Release

³ The United States Attorney's Office for the District of Columbia serves as a local and federal prosecutor. See <https://www.justice.gov/usao-dc>.

⁴ The BOP is not a decision maker as compared to its role under the federal First Step Act.

Clearinghouse has also actively recruited attorneys, social workers, and medical professionals on its website.

The Compassionate Release Clearinghouse seeks attorneys to draft and file compassionate release motions for prisoners, social workers to assist attorneys with prisoners' reentry needs, and medical professionals to help attorneys understand clients' medical conditions and explain to courts the urgency in light of impending medical emergency in overcrowded and unsanitary prisons.⁵

Through the Clearinghouse, various legal entities assembled training manuals and webinars, and developed resources and sample petitions to help recruit, train, and assign lawyers to cases. While these materials have been helpful for the recruitment and training of attorneys, additional attorneys are needed to address the number of applications.

Recommendation #1:

Consider funding incentives for the successful recruitment of additional attorneys willing to represent compassionate release candidates.

III. Communication with Clients

Due to restrictions of movement created by COVID-19 protocols, individuals must be escorted by case workers or counselors for legal calls. There is concern that some protocols impact standards for attorney-client communications, because frequency and ease of communication varies depending upon personnel. One attorney noted that it took almost two weeks before being able to speak by telephone with an assigned client. It is not clear if the BOP has provided guidance to case workers and counselors about the new legislation in order to encourage timely responses to both attorneys and incarcerated individuals who request legal calls. Attorneys require such access in order to effectively represent their clients, and incarcerated individuals require an ability to regularly communicate with counsel and acquire updates on the status of their applications.

Recommendation #2

Facilitate consistent access to telephone calls between attorneys and their clients.

IV. Documentation for Judicial Analysis

The legislation calls for flexibility in addressing individual and family circumstances. Subsequently, judges are seeking as much information about each case as possible, including proof of an inmate's productive use of time. Certifications, participation in educational programming, disciplinary reports, family circumstances, and re-entry plans are all useful for

⁵ Notice available at <https://crcclearinghouse.org/>.

judicial analysis. Some of the data is included in the presentence report. For confidentiality, the presentence report is not part of an inmate's accessible file, so it is not included in the packet sent to the USAO, which is ultimately sent to attorneys representing candidates.

Several attorneys have noted that it was a slow, sometimes difficult process to obtain the presentence report since this document was not made electronic until recently, and many of the cases are decades old. Also, some DC Code offenders have noted that it is difficult to obtain proof or documentation of rehabilitation, such as attendance in relevant programming, and indicators of good behavior.

Recommendation #3

Ensure access to needed documents, especially the presentence report.

V. Release and Reentry

With the implementation of the new legislation, returning citizens need reentry services. The most difficult service to quickly obtain is housing for those without family members or those whose families have relocated out of DC, even if only to nearby suburbs. If post-incarceration supervision is required by the judge, returning citizens seeking a return to families who have relocated must first find short term housing until the interstate compact for supervision is complete. This process can take up to 45 days. In the interim, some families have made sacrificial provisions, including paying for hotel rooms in DC.

Organizations and agencies have collaborated to assist with reentry needs. For example, MORCA, RAN, and CSOSA have worked together to – respectively - find, provide, and pay for some temporary housing.

Recommendation #4

Create needed services, especially easy-access housing, and increase accessibility to persons upon release.

Methodology

To determine the progress regarding the implementation of the legislation, CIC staff contacted participants in the process, including a variety of representatives from local organizations, agencies, and Superior Court. All persons who provided information and insights noted that the progress and processes are on-going and that they each could only provide a snap shot of the process from their perspectives. Each of the persons interviewed noted cooperation and collaboration as key to the current progress. In a subsequent report, the CIC seeks to include the perspectives of persons who were granted or denied compassionate release.