

## CHAPTER 35

### GETTING OUT EARLY: CONDITIONAL AND EARLY RELEASE\*

#### A. Introduction

This Chapter explains the different ways you can be released from prison before serving your full sentence. Parts B through J of this Chapter discuss New York State law, which only applies to state prisoners in New York State. If you are a state prisoner in another state, look at your state's appropriate laws and regulations. Parts K through P discuss federal law, which only applies to federal prisoners.

#### B. New York State

There are four main ways that you can be released from state prison in New York before serving your full or maximum sentence: parole, conditional release, early release, and presumptive release. This Chapter will provide you with information about the last three: Part E explains conditional release, Part F explains early release, and Part G explains presumptive release. This Chapter does not discuss parole. If you are looking for information about parole, see *JLM*, Chapter 32, "Parole."

You must do three things to determine whether or not you are eligible for one of these early release programs: (1) you must figure out which type of sentence you are serving, (2) you must figure out whether you have earned good-time credit, and (3) you must figure out how much good-time credit you have earned. Parts C and D will help you figure this out: Part C(1) explains the different types of sentences in New York and how they relate to conditional, early, and presumptive release programs; Part D explains good-time credit.

You can also be released from state prison before serving your full or maximum sentence in two other ways: clemency and compassionate release. "Clemency" means the power of an executive officer (for example, the Governor of New York) to change the sentence of a criminal defendant to prevent injustice from occurring.<sup>1</sup> "Compassionate release" means a program for releasing dying or seriously ill prisoners. Clemency and compassionate release are harder to obtain than conditional, early, and presumptive release. If you are interested in pursuing these options, see Part I, which explains clemency (with a focus on battered women), and Part J, which explains compassionate release.

#### C. Sentencing Structure in New York

##### 1. Definite, Determinate, and Indeterminate Sentences

There are three kinds of sentences in New York: (1) definite sentences, (2) determinate sentences, and (3) indeterminate sentences. Knowing which kind of sentence you have is important because it will affect your eligibility for good-time credit, early release, conditional release, and presumptive release.

A definite sentence is the type of sentence given to someone who is convicted of a misdemeanor or violation.<sup>2</sup> A definite sentence is for a fixed term (that is, a specific length of time). For example, if you were convicted of a violation and you received a sentence of ten days, then your sentence is a definite sentence.<sup>3</sup> A violation carries a maximum definite sentence of fifteen days.<sup>4</sup> If you were convicted of a Class A misdemeanor, your maximum definite sentence is one year. If you were convicted of a Class B misdemeanor, your maximum definite sentence is three months.<sup>5</sup> A prisoner convicted of a definite sentence serves this

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1. New York State Department of Corrections and Community Supervision, Executive Clemency. [www.ny.gov/services/apply-clemency](http://www.ny.gov/services/apply-clemency) (last visited Feb. 25, 2017).

2. N.Y. Penal Law § 70.15 (McKinney 2011).

3. N.Y. Penal Law § 70.15 (McKinney 2011).

4. N.Y. Penal Law § 70.15 (McKinney 2011).

5. N.Y. Penal Law § 70.15 (McKinney 2011).

sentence in a county or regional jail, unless the prisoner has also received an additional sentence that was either determinate or indeterminate.<sup>6</sup>

A determinate sentence is the type of sentence given to persons convicted of most types of violent felonies,<sup>7</sup> drug felonies,<sup>8</sup> and felony sex offenses.<sup>9</sup> A determinate sentence is for a fixed term. For example, if you were convicted of a violent felony and received a two-year sentence, your sentence is determinate. While a definite sentence cannot exceed one year, the minimum determinate sentence is one-and-a-half years.<sup>10</sup> You usually serve a determinate sentence in state prison.<sup>11</sup>

An indeterminate sentence is the type of sentence given to you if you are convicted of a felony not requiring a determinate sentence.<sup>12</sup> Unless you are convicted of a felony sex offense or receive life imprisonment without parole, you are eligible to receive an indeterminate sentence.<sup>13</sup> An indeterminate sentence is not for a fixed period of time. Instead, an indeterminate sentence is a range of time that includes (1) a minimum term (which must be at least one year), and (2) a maximum term (which must be at least three years, but can be as much as life imprisonment).<sup>14</sup> For example, a sentence of “five to ten years” is an indeterminate sentence where the minimum term is five years and the maximum term is ten years. You must serve the maximum term of an indeterminate sentence if (1) there are no reductions to your sentence or (2) you are not paroled. An indeterminate sentence is generally served in state prison.<sup>15</sup>

It is important to determine what type of sentence or sentences you are serving because the rules for when and how you can become eligible for early release are different for each of the three types of sentences. Below is a brief overview of good-time credit, conditional, early, and presumptive release (more detailed information is provided later in this Chapter).

## 2. Good-Time Credit

A good-time credit is a credit that you can earn in prison for good behavior.<sup>16</sup> If you are serving a definite sentence, and you earn good-time credit, you can use this credit to shorten your sentence. You cannot, however, use the credit to obtain conditional release.

On the other hand, if you are serving a determinate or indeterminate sentence, and you earn good-time credit, you can use this credit to obtain conditional release. Note, however, that if you are serving an indeterminate sentence with a maximum term of life imprisonment or an “intermittent sentence” (that is, a sentence only requiring that you be in jail on certain days of the week or at certain hours of the day), you are ineligible for good-time credit.<sup>17</sup> Part D of this Chapter discusses good-time credit in more detail.

## 3. Conditional Release

Conditional release is a way that you can be released from prison before you serve your full or maximum sentence. Your rights and responsibilities while on conditional release will be very similar to those of someone on parole. If you get out on conditional release, you will sign the same agreement signed by

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6. N.Y. Penal Law § 70.20(2) (McKinney 2011).

7. N.Y. Penal Law § 70.02(2)(a)–(c) (McKinney 2011) (defining the various classes of felony offenses subject to determinate sentence); N.Y. Penal Law § 70.04(2) (McKinney 2011) (stating current requirement to impose a determinate sentence for second violent felony offenders). Starting September 1, 2017, if you are convicted of a Class B or Class C violent felony offense, your sentence must be indeterminate. N.Y. Penal Law §§ 70.02(2)(a), 70.04(2) (McKinney 2011).

8. N.Y. Penal Law § 70.70(2) (McKinney 2011).

9. N.Y. Penal Law § 70.80(3) (McKinney 2011).

10. N.Y. Penal Law § 70.02(3)(d) (McKinney 2011).

11. N.Y. Penal Law § 70.20(1)(a) (McKinney 2011).

12. N.Y. Penal Law § 70.00(1) (McKinney 2011).

13. N.Y. Penal Law § 70.00(1) (McKinney 2011).

14. N.Y. Penal Law § 70.00(2) (McKinney 2011).

15. N.Y. Penal Law § 70.20(1)(a) (McKinney 2011).

16. N.Y. Correct. Law §§ 804(1), 803(1) (McKinney 2003 & Supp. 2007).

17. N.Y. Correct. Law § 803(1) (McKinney 2003 & Supp. 2007); N.Y. Penal Law § 85.00(3) (McKinney 2004); *see also* Ferrara v. Jackson, 99 A.D.2d 545, 546, 471 N.Y.S.2d 629, 630 (App. Div. 2d Dept. 1984) (holding that prisoners serving intermittent sentences in accordance with Article 85 of the New York Penal Law are ineligible for good behavior allowances).

parolees. Additionally, you must follow the rules set by the parole or probation department, or you will risk losing your conditional release. For more information, see *JLM*, Chapter 32, “Parole.”

Although New York State law uses the same word to refer to conditional release from a definite sentence and conditional release from determinate and indeterminate sentences, they are not actually the same thing. Part E of this Chapter discusses conditional release in more detail.

#### 4. Early Release and Presumptive Release

Early release and presumptive release are other ways you can be released from prison before serving a full sentence. Part F of this Chapter discusses early release in more detail. Presumptive release is available to you if you are serving one or more indeterminate sentences for non-violent crimes, you have not committed any serious disciplinary violations, and you have not filed or continued “frivolous” (meaning, so unlikely to win that courts consider them a nuisance) legal claims. Presumptive release works like parole and conditional release. But unlike those programs, it allows you to leave prison without appearing before the parole board. Part G of this Chapter discusses presumptive release in more detail.

### D. Good-Time Credit

#### 1. How to Earn Good-Time Credit

You can earn good-time credit for “good behavior and efficient and willing performance of duties” assigned to you in prison, or for “progress and achievement in an assigned treatment program.”<sup>18</sup> On the other hand, you can lose good-time credits for “bad behavior, violation of institutional rules or failure to perform properly” any duties or programs assigned to you in prison.<sup>19</sup> If you fail to complete a “recommended” program, prison officials may also withhold good-time credits.<sup>20</sup>

You do not have a right to good-time credits.<sup>21</sup> In other words, prison officials are not required to give you good-time credits. But if prison officials think your behavior in prison is acceptable, they will probably grant you good-time credits.

You can earn good-time credit only while you are in prison and not while you are on parole, conditional release, or supervised release. In most jurisdictions, prisons do not have to—and will not—accept credits that you earned in a different state prison or a federal prison.<sup>22</sup>

Depending on the type of sentence you are serving, you can use good-time credit to shorten your sentence, earn unconditional early release, or, in the case of determinate and indeterminate sentences, earn conditional release.

##### (a) Good-Time Credit in Definite Sentences

If you are serving a definite sentence and earn good-time credit, prison officials will use the credit to shorten your sentence and decide if and when you are eligible for unconditional early release. The process where prison officials decide whether to grant you good-time credit depends on the type of facility in which you are imprisoned. If you are serving your definite sentence in a county or regional jail, the sheriff, warden, or other person in charge of the facility will decide whether to give you good-time credit.<sup>23</sup> If you are serving your definite sentence in a state prison, the prison’s Time Allowance Committee (“TAC”) will recommend to

18. N.Y. Correct. Law §§ 803(1), 804(1) (McKinney 2003 & Supp. 2007).

19. N.Y. Correct. Law §§ 803(1), 804(1) (McKinney 2003 & Supp. 2007).

20. *See* *Ferry v. Goord*, 268 A.D.2d 720, 721, 704 N.Y.S.2d 315, 316 (App. Div. 3d Dept. 2000) (finding that good-time credit was properly withheld where prisoner refused to enroll in recommended—non-mandatory—sex offender counseling and substance abuse treatment program); *Burke v. Goord*, 273 A.D.2d 575, 575, 710 N.Y.S.2d 136, 137 (App. Div. 3d Dept. 2000) (finding that good-time credit was lawfully withheld where prisoner refused to enroll in recommended sex offender program); *Lamberty v. Schriver*, 277 A.D.2d 527, 528, 715 N.Y.S.2d 510, 511 (App. Div. 3d Dept. 2000) (holding that the fact that sex offender treatment and aggression therapy programs were “recommended” instead of “assigned” did not prevent time allowance committee from withholding good-time credit).

21. *See* *Bradley v. Ward*, 81 Misc. 2d 713, 716, 366 N.Y.S.2d 841, 844 (N.Y. Sup. Ct. 1975) (finding no statutory right to good behavior time under New York law); N.Y. Correct Law §§ 803(4), 804(3) (McKinney 2003).

22. *See* *Thomas v. Brewer*, 923 F.2d 1361, 1368 (9th Cir. 1991) (refusing to give good-time credit toward reduction in federal sentence for time spent in state prison); *Holtzinger v. Estelle*, 488 F.2d 517, 518 (5th Cir. 1974) (holding that based on Texas statutes, Texas prisoner was not entitled to good-time credit earned for time spent in California).

23. N.Y. Correct. Law § 804(3) (McKinney 2003).

the superintendent the amount of good-time credit it thinks you should receive.<sup>24</sup> Every prison in New York is required to have a TAC consisting of at least eight prison employees.<sup>25</sup> The prison superintendent will review the TAC's recommendation and may add comments to it. He will then forward the recommendation to the Commissioner of Correctional Services, who will make the final decision about how much good-time credit you will receive.<sup>26</sup>

#### (b) Good-Time Credit in Determinate and Indeterminate Sentences

If you are serving a determinate or indeterminate sentence and you earn good-time credit, prison officials will use the credit to decide whether you are eligible for conditional release. Unlike for definite sentences, if you are serving a determinate or indeterminate sentence, you cannot use good-time credit to shorten your sentence or earn unconditional early release.

The TAC starts the process by deciding how much good-time credit you will receive. If you are scheduled to receive the maximum amount of good-time credit, the TAC will review your file four months before you would be entitled to conditional release to determine whether you should, in fact, receive the maximum amount of good-time credit.<sup>27</sup> In deciding whether to grant the maximum good-time credit, the TAC will look for good behavior, efficient and willing performance of assigned duties, and progress and achievement in an assigned treatment program.<sup>28</sup> All of these aspects of your behavior will be considered in light of (1) your attitude, (2) your capacity, and (3) the efforts you made within your capacity.<sup>29</sup> Although the committee will review your entire file, it is not required to interview you at this stage.<sup>30</sup>

After it reviews your file, the TAC will either (1) recommend to the superintendent that you receive the maximum amount of good-time credit or (2) delay making a recommendation because it believes that there might be a sufficient reason not to grant you the maximum amount of good-time credit.

If the TAC decides that there is sufficient reason not to grant you the maximum amount of good-time credit, it will hold a time allowance hearing.<sup>31</sup> You will be notified at least forty-eight hours before the hearing.<sup>32</sup> After you receive notice about the hearing, you will be given the opportunity to present facts that you believe the TAC should consider in making its decision. You will also be given the opportunity to have factual matters investigated. At the hearing, the TAC will reconsider your file and consider any factual matter you (or your appointed assistant) brought to its attention. The TAC can also hear witnesses at its discretion.<sup>33</sup> After the hearing, the TAC will make its recommendation to the superintendent.<sup>34</sup>

The superintendent will review the TAC's recommendation about how much good-credit time you should receive, add comments, and forward the report to the Commissioner.<sup>35</sup> The Commissioner can (1) accept the recommendation, (2) change the amount of good-time credit granted, or (3) send the report back to the committee for reconsideration.<sup>36</sup> Once the Commissioner makes a decision, you will receive a copy of the determination.<sup>37</sup>

If the Commissioner does not grant the maximum amount of good-time credit, you can file a lawsuit in state court under Article 78. For more information about bringing a lawsuit in state court, you should read

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24. N.Y. Comp. Codes R. & Regs. tit. 7, § 261.2 (2007).

25. N.Y. Comp. Codes R. & Regs. tit. 7, § 261.1(a)–(b) (2007).

26. N.Y. Comp. Codes R. & Regs. tit. 7, § 262.1(b) (2007).

27. N.Y. Comp. Codes R. & Regs. tit. 7, § 261.3(a) (2007).

28. N.Y. Comp. Codes R. & Regs. tit. 7, § 260.3(b)(1)–(3) (2007).

29. N.Y. Comp. Codes R. & Regs. tit. 7, § 260.3(b)(1)–(3) (2007).

30. Please note that your prison's TAC is required to interview you if a prior superintendent's hearing recommended a loss of good-time credits. The TAC will then consider if it should restore these lost good-time credits. The TAC will base its recommendation on your behavior since the prior superintendent's hearing. N.Y. Comp. Codes R. & Regs. tit. 7, § 261.3(b) (2007).

31. N.Y. Comp. Codes R. & Regs. tit. 7, § 261.4(a) (2007).

32. N.Y. Comp. Codes R. & Regs. tit. 7, § 261.4(b) (2007).

33. N.Y. Comp. Codes R. & Regs. tit. 7, § 261.4(f) (2001).

34. N.Y. Comp. Codes R. & Regs. tit. 7, § 262.1(a) (2001).

35. N.Y. Comp. Codes R. & Regs. tit. 7, § 262.1(b) (2001).

36. N.Y. Comp. Codes R. & Regs. tit. 7, § 262.1(c) (2001).

37. N.Y. Comp. Codes R. & Regs. tit. 7, § 262.1(d) (2001).

*JLM*, Chapter 22, “How to Challenge Administrative Provisions Using Article 78 of the New York Civil Practice Law and Rules,” and *JLM*, Chapter 18, “Your Rights at Prison Disciplinary Hearings.”

If you decide to pursue a lawsuit in federal court because you believe you unlawfully lost good-time credits, you *must* read *JLM*, Chapter 14, which discusses the Prison Litigation Reform Act (“PLRA”). If you do not follow the requirements of the PLRA, you may lose your good-time credit, become unable to receive presumptive release (see Part H of this Chapter), or lose your right to bring future lawsuits in federal court without paying the full filing fee at the time you file your lawsuit.

## 2. How Much Good-Time Credit You Can Earn

In New York State, the amount of good-time credit you can earn depends on the type of sentence you are serving.

### (a) Good-Time Credit for Definite Sentences

If you are serving a definite sentence, the maximum good-time credit you can earn is one-third of your sentence. For example, if you are serving a definite sentence of fifteen days, the maximum good-time credit you can earn is five days (one-third of fifteen days). If you are serving consecutive definite sentences (that is, one after the other), you can earn good-time credits equal to one-third of the total length of your combined sentences.<sup>38</sup> For example, if you are serving two fifteen-day sentences consecutively, the maximum good-time credit you can earn is ten days (one-third of thirty days).

### (b) Good-Time Credit for a Single Determinate or Indeterminate Sentence

If you are serving a single determinate or indeterminate sentence, you can receive good-time credit as long as your maximum term is not life imprisonment.<sup>39</sup> If you are serving a determinate sentence, the maximum good-time credit you can earn is one-seventh of your sentence.<sup>40</sup> For example, if you are serving a determinate sentence of twenty-one years, the maximum good-time credit you can earn is three years (one-seventh of twenty-one years).

If you are serving an indeterminate sentence, the maximum good-time credit you can earn is one-third of your maximum sentence.<sup>41</sup> For example, if you are serving an indeterminate sentence of fifteen to thirty years, the maximum good-time credit you can earn is ten years (one-third of thirty years).

The calculation is more complicated if you are serving more than one sentence, as shown below.

### (c) Good-Time Credit for Concurrent Determinate Sentences

If you are serving more than one determinate sentence “concurrently” (at the same time), the maximum good-time credit you can earn is one-seventh of the determinate sentence that ends last.<sup>42</sup> For example, if you are serving one determinate sentence of seven years and a second determinate sentence of fourteen years, the maximum good-time credit you can earn is two years (one-seventh of the longer fourteen-year sentence). In this example, if you earn the maximum credit of two years, you are entitled to conditional release after serving twelve years of your sentence. In other words, at that point, your two-year credit would equal the amount of time you had left to serve.

### (d) Good-Time Credit for Consecutive Determinate Sentences

If you are serving more than one determinate sentence “consecutively” (one after the other), the maximum good-time credit you can earn is one-seventh of the combined sentences.<sup>43</sup> For example, if you are serving a seven-year sentence and a fourteen-year sentence consecutively, the maximum good-time credit you can earn is three years (one-seventh of twenty-one years, the combined length of your two sentences). In this example, if you earn the maximum good-time credit of three years, you are entitled to conditional

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38. N.Y. Correct. Law §§ 804(1)–(2) (McKinney 2003 & Supp. 2008).

39. N.Y. Correct. Law § 803(1)(a) (McKinney 2014 & Supp. 2015).

40. N.Y. Correct. Law § 803(1)(c) (McKinney 2014 & Supp. 2015).

41. N.Y. Correct. Law § 803(1)(b) (McKinney 2014 & Supp. 2015).

42. N.Y. Correct. Law § 803(2)(c) (McKinney 2014 & Supp. 2015).

43. N.Y. Correct. Law § 803(2)(d) (McKinney 2014 & Supp. 2015).

release after serving eighteen years of your sentence (that is, the total time of your sentences minus the maximum credit).

(e) Good-Time Credit for Concurrent Indeterminate Sentences

If you are serving more than one indeterminate sentence concurrently, the maximum good-time credit you can earn is one-third of the total term of the *latest ending* indeterminate sentence.<sup>44</sup> For example, if you are serving one indeterminate sentence of one to three years and a second indeterminate sentence of three to six years, the maximum good-time credit you can earn is two years (one-third of the longest maximum sentence of six years). In this example, if you earn the maximum good-time credit, you are entitled to conditional release after four years (that is, the longest maximum sentence minus the maximum credit).

(f) Good-Time Credit for Consecutive Indeterminate Sentences

If you are serving more than one indeterminate sentence consecutively, the maximum good-time credit you can earn is one-third of the combined maximum terms.<sup>45</sup> For example, if you are serving two consecutive indeterminate sentences, one sentence for one to three years and another for three to six years, the maximum good-time credit you can earn is three years (one-third of the total maximum sentence of nine years). In this example, if you earn the maximum credit you are entitled to release after six years (that is, the total of the maximum sentences minus the maximum credit).

(g) Good-Time Credit for Combined Concurrent Determinate and Indeterminate Sentences

If you are serving one or more determinate and one or more indeterminate sentences concurrently, the maximum good-time credit you can earn is *either* (1) one-seventh of the latest ending determinate sentence, *or* (2) one-third of the maximum term of the latest ending indeterminate sentence—whichever allowance is larger.<sup>46</sup> For example, suppose you are serving a determinate sentence of fourteen years at the same time as an indeterminate sentence of six to nine years. You could earn either one-seventh of the determinate sentence (one-seventh of fourteen years, which is two years) or one-third of the indeterminate sentence (one-third of nine years, which is three years). Since the allowance for the indeterminate sentence (three years) is larger than the allowance for the determinate sentence (two years), the maximum good-time credit you can earn is three years. If you earn the maximum credit, you are entitled to conditional release after eleven years (that is, the determinate sentence of fourteen years minus the maximum credit of three years).

(h) Good-Time Credit for Combined Consecutive Determinate and Indeterminate Sentences

If you are serving one or more determinate sentences and one or more indeterminate sentences consecutively, the maximum good-time credit you can earn is one-third of the maximum terms of the indeterminate sentences added together, plus one-seventh of the terms of the determinate sentences added together.<sup>47</sup> For example, suppose you are serving a determinate sentence of fourteen years consecutively with an indeterminate sentence of six to nine years. You can earn up to two years of good-time credit from the determinate sentence (one-seventh of fourteen years) *and* up to three years of good-time credit for the indeterminate sentence (one-third of nine years). If you receive the maximum credit of five years, you are entitled to conditional release after eighteen years (that is, the total of your maximum sentences—twenty-three years—minus the total of your good-time credit—five years).

(i) Potential Changes in Law and how they Affect your Sentence

Suppose your state government passes a new law to reduce the good-time credit that you could have received under an older law. If your offense occurred before the enactment of the new law, then the new law cannot apply to you because it would violate “*ex post facto*” principles. “*Ex post facto*” principles state that you can only be punished under a law that was in effect at the time when you committed the offense, and

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44. N.Y. Correct. Law § 803(2)(a) (McKinney 2003 & Supp. 2008).

45. N.Y. Correct. Law § 803(2)(b) (McKinney 2003 & Supp. 2008).

46. N.Y. Correct. Law § 803(2)(e) (McKinney 2003 & Supp. 2008).

47. N.Y. Correct. Law § 803(2)(f) (McKinney 2003 & Supp. 2008).

your punishment cannot be increased if stricter laws are passed after you committed the offense.<sup>48</sup> If you received a harsher punishment based on a law that was passed after the commission of your offense, you may have a valid constitutional claim.<sup>49</sup>

### 3. Loss of Good-Time Credit

You can lose good-time credit in two ways. First, your prison's TAC may decide not to grant you the maximum good-time credit. The TAC is not required to recommend that you receive the maximum credit allowed by the law.<sup>50</sup> Second, officials may penalize you with a loss of good-time credits after a disciplinary hearing.<sup>51</sup> Please see *JLM*, Chapter 18, "Your Rights at Prison Disciplinary Hearings," to learn more about some of your rights in these proceedings. These proceedings are usually only held when a prisoner is charged with serious misconduct.

Even if you lose good-time credit in a disciplinary hearing, you may regain it later. The loss is not permanent until it affects your consideration for parole, conditional release, or other release.<sup>52</sup> When your prison's TAC reviews your file for the last time before your earliest possible parole or conditional release date, it may decide that you should get back the good-time credit you previously lost. A record of good behavior since the time you lost your good-time credit increases the chance of regaining it.<sup>53</sup>

Note: if you are released early on conditional release or parole, and you later violate the terms of your release or parole and return to prison, you cannot use the good-time credit you earned before release. If you are sent back to prison for a violation, you must start earning good-time credit all over again.<sup>54</sup>

### 4. Challenging the Loss of Good-Time Credit

The Supreme Court has ruled that because good-time credit lead to a shorter time in prison, procedures that take away good-time credit must meet the requirements of the U.S. Constitution's Due Process Clause.<sup>55</sup> This means if prison officials have not followed the appropriate procedures, then you have the right to challenge their decision under Article 78, state habeas proceedings, or federal habeas proceedings. To learn how to do this, see *JLM*, Chapter 22, "How to Challenge Administrative Proceedings Using Article 78 of the New York Civil Practice Law and Rules," *JLM*, Chapter 21, "State Habeas Corpus," and *JLM*, Chapter 13, "Federal Habeas Corpus." *JLM*, Chapter 18, "Your Rights at Prison Disciplinary Hearings," also explains your right to good-time credit.

As noted above, if you decide to file a lawsuit in federal court, you *must* first read *JLM*, Chapter 14, which discusses the Prison Litigation Reform Act ("PLRA"). If you do not follow the requirements in the PLRA, you may lose your good-time credit, you may become unable to receive presumptive release (see Part H of this Chapter), or you may lose your right to bring future claims in federal court without paying the full filing fee at the time you file your claim.

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48. See *Weaver v. Graham*, 450 U.S. 24, 28, 101 S. Ct. 960, 964, 67 L. Ed. 2d 17, 22 (1981) (applying new requirements for good-time credit to a prisoner whose crime occurred before the new requirements were established is a violation of the *ex post facto* clause). *But see* *In re Ramirez*, 39 Cal.3d 931, 936, 705 P.2d 897, 901, 218 Cal. Rptr. 324, 328 (Cal. 1985) (finding that a law is not a violation of the *ex post facto* principle when applied to prison misconduct that occurred after the new law's enactment, even if the original crime occurred before the enactment of the law).

49. For more information, see *JLM*, Chapter 9, "Appealing Your Conviction or Sentence," and *JLM*, Chapter 20, "Using Article 440 of the NY Criminal Procedural Law to Attack Your Unfair Conviction or Illegal Sentence."

50. N.Y. Comp. Codes R. & Regs. tit. 7, § 261.3(c) (2008).

51. N.Y. Comp. Codes R. & Regs. tit. 7, § 254.7(a)(ii) (2008).

52. N.Y. Comp. Codes R. & Regs. tit. 7, § 260.4(b) (2008).

53. N.Y. Comp. Codes R. & Regs. tit. 7 § 261.3(b) (2013).

54. N.Y. Correct. Law § 803(5) (McKinney 2003 & Supp. 2008).

55. *Wolff v. McDonnell*, 418 U.S. 539, 557, 94 S. Ct. 2963, 2975, 41 L. Ed. 2d 935, 951 (1974); see also *Sandin v. Conner*, 515 U.S. 472, 478, 115 S. Ct. 2293, 2297, 132 L. Ed. 2d 418, 426 (1995) (holding that neither the Due Process Clause nor the Hawaii regulations created a liberty interest in avoiding disciplinary confinement for 30 days; restating the holding in *Wolff v. McDonnell* that good-time credits could not be revoked without adequate procedures because the statute had created a "liberty interest").

### E. Merit-Time Credit

In addition to good-time credit, prisoners may also earn merit-time credit. Merit-time credit can shorten certain indeterminate and determinate sentences.<sup>56</sup>

If you are serving an indeterminate sentence, merit-time credit can shorten it by reducing the *minimum* length of the indeterminate sentence (unlike good-time credit, which reduces the *maximum* length of an indeterminate sentence).<sup>57</sup> Merit-time credit can only be applied to your indeterminate sentence if you were in the custody of the Department of Corrections and serving an indeterminate sentence between December 14, 2004 and September 1, 2005.<sup>58</sup> If you were serving an indeterminate sentence for a non-violent crime during this time period,<sup>59</sup> you may receive merit-time allowances of up to one-sixth of the minimum period of your sentence.<sup>60</sup> For example, if you are serving a sentence of twelve to sixteen years, you may receive a merit-time allowance of up to two years, which is one-sixth of your twelve-year minimum sentence. If you receive this credit, you are first eligible for release (conditional or presumptive) after serving five-sixths of the minimum period of your sentence. In this example, you would be eligible for release after ten years.

Merit-time credit may also shorten determinate sentences for certain felony drug crimes by one seventh.<sup>61</sup> This is in addition to good time credit.<sup>62</sup> Merit-time credit is only available to prisoners who were sentenced to a qualifying determinate sentence before September 1, 2011.<sup>63</sup> If you are serving a determinate sentence that qualifies for merit-time, you may receive merit-time allowances of up to one-seventh of your sentence.<sup>64</sup> For example, if you are serving a sentence of seven years, you may receive a merit-time credit of up to one year, which is one-seventh of your seven-year sentence. If you receive this credit, you are first eligible for release (conditional or presumptive) after serving six years (six-sevenths of your seven-year sentence).<sup>65</sup>

To obtain merit-time credit you must also complete other requirements. First, you must successfully complete a work and treatment program.<sup>66</sup> Second, you must obtain at least one of the following:

- A general equivalency diploma (GED),
- An alcohol and substance abuse treatment certificate,
- A vocational trade certificate after completing six months of vocational programming, or
- 400 hours of service on a community work crew.

Like good-time credit, you do not have a right to merit-time credit. This means that prison officials are not required to give you merit-time credit. If you receive a serious disciplinary infraction or file a frivolous lawsuit against a prison official, you may not receive merit-time credit.<sup>67</sup> Frivolous means the

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56. N.Y. State Dept. of Corrections and Community Supervision Programs, Guidance and Counseling, *available at* <http://www.doocs.ny.gov/ProgramServices/guidance.html#earn> (last visited Feb. 27, 2015).

57. N.Y. Correct. Law § 803(1)(d)(iii) (McKinney 2003 & Supp. 2008). Information about merit-time credits is available online. *See* New York State Department of Corrections and Community Supervision Programs, *available at* <http://www.doocs.ny.gov/ProgramServices/guidance.html#earn> (last visited Feb. 27, 2015).

58. N.Y. Correct. Law § 803(1)(d)(v) (McKinney 2003 & Supp. 2008).

59. Under New York state law, a prisoner is not eligible for merit-time if he is presently serving a sentence for, or has been previously convicted of, the following violent crimes: (1) a Class A-I felony, (2) a violent felony offense under Section 70.02 of the New York Penal Law, (3) manslaughter in the second degree, (4) vehicular manslaughter in the second or first degree, (5) criminally negligent homicide, (6) an offense in Article 130 of the New York Penal Law (“relating to sex offenses”), (7) incest, (8) an offense defined in Article 263 of the New York Penal Law (“relating to the use of a child in a sexual performance”), or (9) aggravated harassment of an employee by an inmate. N.Y. Correct. Law § 803(1)(d)(ii) (McKinney 2003 & Supp. 2008).

60. N.Y. Correct. Law § 803(1)(d)(iii) (McKinney 2003 & Supp. 2008).

61. If you are serving time for committing a drug-related crime and were sentenced to a determinate sentence, you may be eligible for merit-time credits if the crime you were convicted of was a felony offense under Sections 70.70 or 70.71 of the New York Penal Law. *See* N.Y. Correct. Law § 803(1-a) (McKinney 2003 & Supp. 2008).

62. *See* The Legal Aid Society, New York Sentence Basics, <http://www.legal-aid.org/media/120769/sentence-basics.pdf> (last accessed Feb. 27, 2015).

63. N.Y. Correct. Law § 803(1)(d)(v) (McKinney 2003 & Supp. 2008).

64. N.Y. Correct. Law § 803(1)(d)(iii) (McKinney 2003 & Supp. 2008).

65. *See* The Legal Aid Society, New York Sentence Basics, <http://www.legal-aid.org/media/120769/sentence-basics.pdf> (last accessed Nov. 26, 2016).

66. N.Y. Correct. Law § 803(1)(d)(iv) (McKinney 2003 & Supp. 2008).

67. N.Y. Correct. Law § 803(1)(d)(iv) (McKinney 2003 & Supp. 2008).

lawsuit was filed or continued in bad faith, to harass someone, or the suit has no reasonable basis and is not supported by the law.<sup>68</sup> Please note that merit-time credit may be used to gain presumptive release. To learn more about the Presumptive Release Program, your eligibility for it, and how your merit-time credit can be used in the program, read Part H, "Presumptive Release."

## F. Conditional Release

### 1. Conditional Release from a Definite Sentence

If you are serving a definite sentence with a term of more than ninety days, you are eligible for conditional release after you have served sixty days of your sentence.<sup>69</sup> Conditional release is at the discretion of the Board of Parole. The Board of Parole can also impose certain conditions for your release.<sup>70</sup>

Conditional release from a definite sentence lasts for one year no matter how much time you have remaining in your sentence when you are released. Also, if you violate the terms of your conditional release at any time during that year, you may be returned to prison and must finish out your full sentence as if you had never been released.<sup>71</sup>

### 2. Conditional Release from a Determinate or Indeterminate Sentence

Based on the type of determinate or indeterminate sentence or sentences you are serving, you may be eligible for conditional release from prison as soon as the good-time credit you have earned in prison is equal to the amount of time that you have left to serve on your maximum sentence or sentences.<sup>72</sup> For example, if you are serving an indeterminate sentence of three to six years and you have earned two years of good-time credit, you are eligible for release when you have served four years of your sentence (the maximum sentence of six years minus the two years of good-time credit earned).

Note that if you are serving one or more determinate and one or more indeterminate sentences concurrently (that is, at the same time), you cannot be granted conditional release until you have served six-sevenths of the determinate sentence with the longest time to run.<sup>73</sup> For example, if you are serving a determinate sentence of twenty-one years at the same time as an indeterminate sentence of ten to twenty-one years, you cannot be released until you have served eighteen years (six-sevenths of your determinate sentence), even if you have earned more than three years of good-time credit against your indeterminate sentence.

### 3. The Release Agreement

Before you can leave prison on conditional release, you must sign a release agreement. This agreement explains the conditions of your release. By signing the agreement, you promise to obey all of the listed rules. The rules of your conditional release may change at any time before your sentence is over. A parole officer may also add special conditions. For example, the parole officer may impose a curfew, require that you attend an alcohol treatment program, or require you to find housing.<sup>74</sup> See *JLM*, Chapter 32, "Parole," for an explanation of parole in New York.

If you are conditionally released from a determinate sentence as a violent felony offender or a drug offender serving a sentence other than life in prison, you will be required to sign a post-release supervision agreement that will extend your supervision for three to five years.

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68. N.Y. C.P.L.R. 8303-a(c)(i) (McKinney 2012)

69. N.Y. Penal Law § 70.40(2) (McKinney 2004 & Supp. 2008).

70. N.Y. Penal Law § 70.40(2) (McKinney 2004 & Supp. 2008).

71. N.Y. Penal Law § 70.40(3)(b) (McKinney 2004 & Supp. 2008).

72. N.Y. Penal Law § 70.40(1)(b) (McKinney 2004 & Supp. 2008).

73. N.Y. Penal Law § 70.40(1)(b) (McKinney 2004 & Supp. 2008).

74. *People ex rel. Travis v. Coombe*, 219 A.D.2d 881, 881–82, 632 N.Y.S.2d 340, 340 (4th Dept. 1995) (conditions of release included requirement that parolee find housing, and when potential parolee failed to do so, he was not released); *People ex rel. DeFlumer v. Strack*, 212 A.D.2d 555, 555, 623 N.Y.S.2d 1, 1 (App. Div. 2d Dept. 1995) (conditions of release included that parolee must live in approved housing, which in this case was the home of parolee's sister).

#### 4. Jenna's Law and Post-Release Supervision for All Determinate Sentences and Drug Offenses

In 1998, the New York state legislature passed Jenna's Law.<sup>75</sup> This law imposes a period of mandatory post-release supervision for all prisoners serving determinate sentences. The Drug Law Reform Act of 2004 requires that all sentencing for felony drug offenses include, as a part of the sentence, a period of post-release supervision.<sup>76</sup> Unlike prisoners serving definite sentences, who are conditionally released with one year of supervision, and unlike prisoners serving indeterminate sentences, who are conditionally released on terms very similar to parole, those serving determinate sentences are subject to mandatory post-release supervision.<sup>77</sup>

If you received a determinate sentence for a crime committed on or after September 1, 1998, you will be subject to post-release supervision. Generally, for felony offenses that are not sex offenses, the period of post-release supervision for determinate sentences is five years. However, drug offenses and first-time violent felony offenses listed in section (a) (see below) may have shorter periods of supervision.<sup>78</sup> The court has the power to set your post-release supervision period anywhere between the minimum and the maximum possible periods under the law.<sup>79</sup> If the court does not specify a time, however, you will most likely be subject to the maximum possible post-release supervision time available for the particular crime for which you were convicted.

##### (a) Length of Post-Release Supervision

Three groups of offenses lead to different lengths of post-release supervision: felony drug offenses, first-time violent felony offenses, and felony sex offenses committed after April 13, 2007. For more information on felony sex offenses see *JLM*, Chapter 36, "Special Considerations for Sex Offenders." The tables below show possible post-release supervision time, depending on your sentence's type and class.

##### Drug Offenses

	First Time	Non-first Time
Class D or E	1 year	1–2 years
Class B or C	1–2 years	1 ½–3 years

##### Violent Felony Offenses

	First Time / Non-first time
Class D or E	1 ½–3 years
Class B or C	2 ½–5 years

75. Jenna's Law is named after Jenna Griebshaber, who was murdered by an individual who had been convicted of a violent felony and had been released early from prison after serving two-thirds of his indeterminate sentence. The purpose of Jenna's Law was to ensure that violent offenders are appropriately monitored upon their reintroduction into society. See Barry Kamins, *New Criminal Law and Procedure Legislation*, 81-FEB N.Y. St. B.J. 28, 28 (2009).

76. See, e.g., N.Y. Penal Law §§ 70.70(2)(a), (3)(b), (4)(b) (McKinney 2011); N.Y. Penal Law §§ 70.71(2)(b), (3)(b), (4)(b) (McKinney 2011).

77. N.Y. Penal Law § 70.45(1) (McKinney 2011).

78. N.Y. Penal Law § 70.45(2) (McKinney 2004 & Supp. 2007).

79. See e.g., N.Y. Penal Law § 70.45(2)(b) (McKinney 2011) ("[S]uch period shall be not less than one year nor more than two years whenever a determinate sentence of imprisonment is imposed ... upon a conviction of a class B or class C felony offense[.]").

### Felony Sex Offenses

	First Time	Non-first Time
Class D or E	3–10 years <sup>80</sup>	5–15 years <sup>81</sup>
Class C	5–15 years <sup>82</sup>	7–20 years <sup>83</sup>
Class B	5–20 years <sup>84</sup>	10–25 years <sup>85</sup>
Child Sexual Assault		10–20 years <sup>86</sup>

#### (b) Results of Violating a Condition of Post-Release Supervision

If you violate any of the terms of your post-release supervision, you will receive a revocation hearing. The rules for revocation hearings for post-release supervision are the same as the rules for parole revocation.<sup>87</sup> See *JLM*, Chapter 32, “Parole,” for an explanation of parole revocation hearings in New York. If your post-release supervision is revoked at the hearing, and you are not a felony sex-offender, then you may be sent back to prison. You cannot be sent back to prison for more time than you have remaining in your post-release supervision period and you can never be sent back for more than five years.<sup>88</sup>

For example, if you are a first time Class D drug offender, you will undergo 1 year of post-release supervision; that is 12 months of supervision. If 6 months into your post-release supervision, you were to violate one of the terms in your post-release supervision agreement, you could be sent back to jail for 6 months, to serve out the remaining 6 months of post-release supervision remaining on your scale. If instead you had 10 years of post-release supervision, and you violated a term of your agreement 2 years into your post-release supervision, you could be sent back to jail for at most five years, even though you have 8 years remaining on your post-release supervision.

If you were convicted of a felony sex offense, the maximum amount of time that you can be sent back to prison is the amount of time remaining in your post-release supervision period, even if it is longer than five years.<sup>89</sup> If you have fewer than three years remaining of post-release supervision, you will be released after you serve three years. If you have three or more years of supervised release left when you are given an additional term of imprisonment for violating the terms of your supervised release, you will not be automatically released after serving three years. Instead, after serving three years, your case will be reviewed by the Board of Parole. The Board will determine whether you can be released to post-release supervision or whether you should stay in prison and have your case reviewed a second time at a date not more than twenty-four months after the Board’s determination on whether to release you.<sup>90</sup>

If your post-release supervision is revoked, you may be sentenced for a period longer than the maximum time periods listed above if you were given both determinate *and* indeterminate sentences.<sup>91</sup> If you had more time left on the combined amount of your indeterminate and determinate sentences when you left prison on supervised release, you may be sentenced to serve that remaining amount of time instead of the shorter period of supervised release.

The amount of time you served under post-release supervision will not count if the Board of Parole declares you “delinquent.” The Board will declare you “delinquent” if you violate a condition of your release.<sup>92</sup> Violating a condition of your release will result in your incarceration and essentially stops the clock counting the time you have spent in post-release supervision. The clock will remain stopped until you

80. N.Y. Penal Law § 70.45(2-a)(a), (d) (McKinney 2004 & Supp. 2007).

81. N.Y. Penal Law § 70.45(2-a)(g) (McKinney 2004 & Supp. 2007).

82. N.Y. Penal Law § 70.45(2-a)(b), (e) (McKinney 2004 & Supp. 2007).

83. N.Y. Penal Law § 70.45(2-a)(h) (McKinney 2004 & Supp. 2007).

84. N.Y. Penal Law § 70.45(2-a)(c), (f) (McKinney 2004 & Supp. 2007).

85. N.Y. Penal Law § 70.45(2-a)(i) (McKinney 2004 & Supp. 2007).

86. N.Y. Penal Law § 70.45(2-a)(j) (McKinney 2004 & Supp. 2007).

87. N.Y. Exec. Law § 259-i(3) (McKinney 2005 & Supp. 2007).

88. N.Y. Penal Law § 70.45(1) (McKinney 2004 & Supp. 2007).

89. N.Y. Penal Law § 70.45(1) (McKinney 2004 & Supp. 2007).

90. N.Y. Penal Law § 70.45(1-a) (McKinney 2004 & Supp. 2007).

91. N.Y. Penal Law § 70.45(1) (McKinney 2004 & Supp. 2007).

92. N.Y. Penal Law § 70.45(5)(d)(i) (McKinney 2004 & Supp. 2007).

are released from prison back to supervision. The time you spend in custody while awaiting the decision of whether or not your post-release supervision is revoked will be credited towards your maximum sentence, or aggregate maximum sentences (if you have multiple sentences) for which you were released. If the amount of time you spent in custody is zero, it will then be credited against your remaining period of post-release supervision.<sup>93</sup> If you are sentenced to a new determinate or indeterminate sentence, your remaining period of post-release supervision will be on hold until you are re-released from prison, at which time you will begin serving that period of post-release supervision again.<sup>94</sup>

### (c) Challenging Post-Release Supervision

If you have received a term of post-release supervision, you should read this section carefully to ensure that your sentence is lawful, as there have been a number of important changes in New York law that will affect many prisoners.

You may challenge your term of post-release supervision if you are serving a determinate sentence, and your sentencing judge failed to impose a term of post-release supervision at your sentencing. Prior to 2008, the New York Department of Corrections (DOCS) (not the sentencing judge) occasionally imposed a mandatory period of post-release supervision for prisoners at the time of release. In 2008, however, the New York Court of Appeals held that DOCS may not do this—only a *judge* can impose post-release supervision.<sup>95</sup> In addition, the judge must have imposed or stated the term of post-release supervision *at sentencing*.<sup>96</sup> Because the law has changed, if you were given post-release supervision, you should confirm that this was given to you by your sentencing judge and *not* by DOCS. If your post-release supervision was imposed by DOCS at the time of release and not by your sentencing judge at the time of your sentencing, you may be able to challenge the post-release supervision.

This change in the law affects thousands of prisoners in New York State. In order to help deal with these cases in which judges failed to impose or state post-release supervision at sentencing, the New York legislature passed N.Y. Penal Law § 70.85, effective as of June 30, 2008.<sup>97</sup> This statute applies to cases in which a determinate sentence requiring post-release supervision was imposed between September 1, 1998 and June 30, 2008, and the court failed to impose or state the term of post-release supervision at sentencing. If your case fits within this category, the court may (with the approval of the district attorney) resentence you and re-impose your original determinate sentence without requiring the term of post-release supervision.<sup>98</sup> In the resentencing process, you have certain rights. DOCS or the Division of Parole must notify you, as well as the sentencing judge, that resentencing must take place.<sup>99</sup> Within ten days of receiving the notice, the sentencing judge must appoint counsel for you.<sup>100</sup> Within forty days after the notice, the judge must make a decision and resentence you. Note that you may waive these deadlines.<sup>101</sup>

Even if DOCS imposed post-release supervision on you, a judge may re-sentence you and still impose a term of post-release supervision.<sup>102</sup> Additionally, if you were placed on post-release supervision, and the terms of that post-release supervision were imposed by DOCS (not the sentencing judge), *and* you are then charged with violating the terms of your post-release supervision, you *cannot* be re-incarcerated for violating those terms.<sup>103</sup> If you are incarcerated for these reasons, you are entitled to immediate release.

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93. N.Y. Penal Law § 70.45(5)(d) (McKinney 2004 & Supp. 2007).

94. N.Y. Penal Law §§ 70.45(5)(e), (f) (McKinney 2004 & Supp. 2007).

95. *People v. Sparber*, 10 N.Y.3d 457, 468–70, 889 N.E.2d 459, 463, 859 N.Y.S.2d 582, No. 53, slip op. at 7 (2008) (finding the procedure through which post-release supervision was imposed did not comply with the statutory mandate and remanding to trial court for re-sentencing, since court precedents have emphasized that sentencing is a uniquely judicial responsibility).

97. N.Y. Penal Law § 70.85 (McKinney 2009).

98. N.Y. Penal Law § 70.85 (McKinney 2009).

98. N.Y. Penal Law § 70.85 (McKinney 2009).

99. N.Y. Correct. Law § 601-d(2) (McKinney 2014 & Supp. 2015).

100. N.Y. Correct. Law § 601-d(4)(a) (McKinney 2014 & Supp. 2015).

101. N.Y. Correct. Law § 601-d(4)(e) (McKinney 2014 & Supp. 2015).

102. *People v. Sparber*, 10 N.Y.3d 457, 471, 889 N.E.2d 459, 464, 859 N.Y.S.2d 590, No. 53, slip op. at 7 (2008) (finding the procedure through which post-release supervision was imposed did not comply with the statutory mandate and remanding to trial court for re-sentencing).

103. *People ex rel. Lucas Foote v. Piscotti*, 51 A.D.3d 1407, 1408, 857 N.Y.S.2d 515, 515, No. 925 KAH 07-00912,

There is also another way that you can challenge your term of post-release supervision. If you pleaded guilty and received a sentence that included a mandatory term of post-release supervision, you may be able to vacate (take back) your guilty plea if you were not informed that your sentence would include post-release supervision during the plea colloquy (the exchange of questions and answers between a judge and defendant who is pleading guilty). The New York State Court of Appeals (the highest court in New York) held that if you pleaded guilty without being informed that you would be subject to post-release supervision, you could vacate your guilty plea, because the plea was not a “voluntary and intelligent choice.”<sup>104</sup> The New York Appellate Division also held that if you pleaded guilty, and the sentencing judge did not advise you of the post-release supervision during the plea colloquy, but did impose post-release supervision at sentencing, N.Y. Penal Law § 70.85 does not apply, and the plea has to be vacated.<sup>105</sup>

Note that if you were not informed of the post-release supervision during your plea colloquy, although you can take back your plea, you will not be able to take back the guilty judgment against you.<sup>106</sup> This means that you will either be given a new trial or re-sentencing. If you are re-sentenced, however, you will likely get the same sentence, so only take back your plea if you want to go to trial instead of keeping your plea. Even if you do not wish to vacate your plea or if you have already served your sentence, you may be able to challenge your post-release supervision without setting aside your sentence.

### 5. Length of Your Conditional Release

If you are conditionally released from a definite sentence, you will be on conditional release for one year—no matter how little time you have remaining on your sentence.<sup>107</sup> During this year, the Board of Parole will supervise you, and you must continue to follow the terms of your conditional release agreement.<sup>108</sup>

If you are conditionally released from an indeterminate sentence, your conditional release will last for the maximum amount of time remaining on your sentence.<sup>109</sup> For example, if you get out on conditional release after twenty years of an indeterminate sentence of fifteen to thirty years, you will be on conditional release for ten years. For those ten years, you will be in the legal custody of the Board of Parole. You will have to obey the conditions of your release, and you will have to report regularly to a parole officer, just like a person on parole.<sup>110</sup> For more information about parole, see Chapter 32, “Parole,” of the *JLM*.

If you are granted conditional release from a determinate sentence, you will be under supervision for six months to five years. For more information about conditional release after a determinate sentence, see Part E(4) above.

If you are granted conditional release from a determinate or indeterminate sentence, you may be able to end your conditional release supervision early (which is also called a “merit termination”). The Board of Parole has the power to grant an absolute discharge to individuals on conditional release, unless you were convicted of certain charges, including violent felony offenses, sex offenses,<sup>111</sup> some murder charges, hate crimes, terrorism, and some crimes involving youths.<sup>112</sup> This relief is not available for anyone required to register as a sex offender. This kind of merit termination satisfies all the remaining time on your sentence, as if you had served it all in prison.

slip op. at 1 (App. Div. 4th Dept. 2008); *People ex rel. Gerard v. Kralik*, 51 A.D.3d 1045, 1046, 858 N.Y.S.2d 771, 772, No. 2008-02692, slip op. at 1–2 (App. Div. 2nd Dept. 2008); *see also* *Prendergast v. N.Y. State Dept. of Corr.*, 51 A.D.3d 1133, 1133–34, 856 N.Y.S.2d 725, 726, No. 503884, slip op. at 1–2 (App. Div. 3d Dept. 2008) (holding that only a court may impose post-release supervision).

104. *New York v. Catu*, 4 N.Y.3d 242, 245, 825 N.E.2d 1081, 1082, 792 N.Y.S.2d 887, 888 (2005).

105. *People v. Rucker*, 2009 NY Slip Op 8087, \*2, 67 A.D.3d 1126, 1128, 888 N.Y.S.2d 313, 316 (3d Dept. 2009).

106. *People v. Louree*, 8 N.Y.3d 541, 546, 869 N.E.2d 18, 21–22, 838 N.Y.S.2d 18 (2007).

107. N.Y. Penal Law § 70.40(2) (McKinney 2011).

108. N.Y. Penal Law § 70.40(2) (McKinney 2011).

109. N.Y. Penal Law § 70.40(1)(b) (McKinney 2011).

110. *See* N.Y. Penal Law § 70.40(1) (McKinney 2011).

111. *But see* N.Y. Exec. Law § 259-j(1) (McKinney 2005 & Supp. 2007) (allowing for a discharge of post-release supervision after three years if certain conditions are met). Please note that if you were convicted of a felony sex offense, discharge of post-release supervision is available only after five years if certain conditions are met.

112. N.Y. Exec. Law § 259-j (McKinney 2005 & Supp. 2007). For a complete list of offenses, *see* N.Y. Exec. Law § 259-j(1) (McKinney 2005 & Supp. 2007).

The Board of Parole has the discretion to grant or withhold early discharges from conditional release. Ask your parole officer about early discharge to find out whether and when it may be a possibility for you.

## 6. Revocation of Conditional Release

Conditional release can be revoked in the same way that parole can be revoked. Both the Conditional Release Commission and the Board of Parole have broad discretion to revoke conditional release.<sup>113</sup> If an officer of the Conditional Release Commission (applicable if your conditional release is from a definite sentence) or a parole officer (applicable if your conditional release is from a determinate or indeterminate sentence) has reasonable cause to believe that you violated the terms of your conditional release, your conditional release may be revoked.<sup>114</sup> Examples of such violations include failure to appear for a scheduled meeting with your parole officer or participation in criminal activities. Before your conditional release can be revoked, however, your parole officer must report your actions to a member of the Board, who may then issue a warrant for temporary detention.<sup>115</sup>

Before revoking your conditional release, the government must schedule a hearing and notify you about it. The written notice must state the date, place, and purpose of the hearing.<sup>116</sup> The notice must also inform you of which conditions you are alleged to have violated, your right to appear and speak on your own behalf, your right to present evidence, and your right to confront the witnesses who testify against you.<sup>117</sup> The government will hold a preliminary revocation hearing, which you are required to attend, within fifteen days of the execution of the warrant for temporary detention.<sup>118</sup> At this hearing, the government will determine whether there is probable cause (that is, a legally sufficient reason) to believe that you violated the conditions of your release.<sup>119</sup> If probable cause is not found, the case will be dismissed, and you will be released again.<sup>120</sup> If probable cause is found, however, the government must hold a revocation hearing within ninety days.<sup>121</sup> The government must notify you in writing at least fourteen days before the revocation hearing. The notice must include the date, place, and time of the hearing.<sup>122</sup>

The Conditional Release Commission or the Board of Parole must provide you with due process before permanently revoking your conditional release.<sup>123</sup> In order to satisfy the requirements of the Constitution's due process clause, there must be a finding by a "preponderance of the evidence" (meaning that it must be "more likely than not") that you violated a term of your conditional release, and you must be given an opportunity to be heard.<sup>124</sup> You are also entitled to a lawyer at the revocation hearing.<sup>125</sup> If you are unable to

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113. See *Hyser v. Reed*, 318 F.2d 225, 234, 115 U.S. App. D.C. 254, 263 (D.C. Cir. 1963) (*en banc*) (finding statute gives Board of Parole broad discretion to both grant and revoke parole, without requiring adversarial hearings). See also N.Y. Penal Law § 70.40(3)(b) (stating that the local Conditional Release Commission or Board of Parole that supervises a person on conditional release has discretion to revoke their conditional release).

114. N.Y. Correction Law § 274(1); N.Y. Exec. Law § 259-i(3)(a)(i) (McKinney 2005 & Supp. 2007).

115. N.Y. Exec. Law § 259-i(3)(a)(i) (McKinney 2005 & Supp. 2007).

116. N.Y. Exec. Law § 259-i(3)(c)(iii) (McKinney 2005 & Supp. 2007).

117. N.Y. Exec. Law § 259-i(3)(c)(iii) (McKinney 2005 & Supp. 2007).

118. N.Y. Exec. Law § 259-i(3)(c)(iv) (McKinney 2005 & Supp. 2007).

119. N.Y. Exec. Law § 259-i(3)(c)(iv) (McKinney 2005 & Supp. 2007).

120. N.Y. Exec. Law § 259-i(3)(c)(vii) (McKinney 2005 & Supp. 2007).

121. N.Y. Exec. Law § 259-i(3)(f)(i) (McKinney 2005 & Supp. 2007). Please take note that this ninety day time may be extended if you request and receive a postponement of your conditional release revocation hearing, or if you consent to the Conditional Release Commission's or Parole Board's request for a revocation hearing beyond the ninety day time limit.

122. N.Y. Exec. Law § 259-i(3)(f)(iii) (McKinney 2005 & Supp. 2007).

123. See *Morrissey v. Brewer*, 408 U.S. 471, 482–84, 92 S. Ct. 2593, 2601–02, 33 L. Ed. 2d 484, 495–97 (1972) (holding that because a parolee faces a severe loss of liberty if his parole is revoked, due process is required before parole can be revoked). Although this ruling dealt with parole revocation, one can argue the reasoning should apply equally to the conditional release revocation. See *Kroemer v. Joy*, 2003 N.Y. Slip Op. 23858, 2 Misc. 3d 265, 268, 769 N.Y.S.2d 357, 360 (Sup. Ct. Yates County 2003) (finding prisoners in temporary release status have a due process right to a hearing before their status is revoked since it would be a loss of liberty); *Friedl v. City of New York*, 210 F.3d 79, 84, 46 Fed. R. Serv. 3d 146 (2d Cir. 2000) (finding that prisoner on work release is entitled to procedural due process before his status can be denied to prevent a deprivation of his liberty); *Anderson v. Recore*, 446 F.3d 324, 333–34 (2d Cir. 2006) (prisoners have a protected liberty interest in continuation in a temporary release program that affords them due process rights including notice and a hearing before its revocation).

124. N.Y. Crim. Proc. Law § 410.70(1)(b), (3) (McKinney 2005); N.Y. Exec. Law § 259-i(3)(f)(v)–(vi) (entitlement to

afford a lawyer, the local county court must provide you with a lawyer for the hearing.<sup>126</sup> At the hearing, you will be given the opportunity to make a statement.<sup>127</sup> You also have the right to present evidence and to confront and cross-examine witnesses testifying against you.<sup>128</sup> If it cannot be determined by a preponderance of the evidence that you violated a condition of your release, the case will be dismissed and you will again be released.<sup>129</sup> But if it is determined by a preponderance of the evidence that you violated one or more conditions of your release in an important respect (such as failing to appear for a scheduled meeting with your parole officer), your conditional release may be revoked, and you will again be detained or your release may be modified.<sup>130</sup> If you are released again, the time you spent in detention will be credited against the time you must serve.<sup>131</sup>

## 7. Disadvantages of Conditional Release for Prisoners Serving Definite Sentences

Under some circumstances, it may be preferable to stay in prison rather than take advantage of conditional release. For example, if you are a definite-sentence prisoner, and you are conditionally released, you must remain under the supervision of the Conditional Release Commission for a full year, no matter how little time is left on your original sentence.<sup>132</sup> When you are near the end of a definite sentence (which could even be shortened by good-time credit), you might have to choose between conditional release *now* (followed by a year of supervision) or another month or so in prison (followed by complete freedom from supervision). The local Conditional Release Commission may try to grant you conditional release near the end of your sentence just to keep you under supervision for a year. For example, prisoners will often apply for conditional release when they first become eligible for it, but the local Conditional Release Commission will often deny these requests until shortly before their sentence ends so as keep these prisoners under supervision for a year. If you are serving a definite sentence and the Commission agrees to grant you conditional release, be sure you know exactly how much additional time you would have to serve in prison to finish your sentence. You should think about whether you would rather serve a short additional time in prison, or spend what might be a longer time (one year) under supervision. There are different reasons to make either of these choices, so neither is the wrong decision. It is important, however, to be aware of your options, and to realize how much of your life you are committing to supervision (either by being incarcerated or by being under post-release supervision). You are in the best position to decide which option makes the most sense for you.

### G. Early Release From a Definite Sentence

If you are serving a definite sentence but do not get out on conditional release, you can still get out before the end of your sentence if you have earned good-time credit. Remember, good-time credit is not used to determine eligibility for conditional release from a definite sentence.

If the amount of good-time credit that you have earned equals the time remaining on your definite sentence, you should request to be unconditionally released. Because you cannot earn good-time credit for more than one-third of your definite sentence, you will have to serve at least two-thirds of your definite sentence before being eligible for this automatic early release.<sup>133</sup> For example, if you were sentenced to nine months and earned three months of good-time credit, your sentence can be reduced by three months, making it a six-month sentence.

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hearing), (viii)–(ix) (requiring preponderance of evidence) (McKinney 2005 & Supp. 2007).

125. N.Y. Crim. Proc. Law § 410.70(4) (McKinney 2005); N.Y. Exec. Law § 259-i(3)(f)(v) (McKinney 2005 & Supp. 2007).

126. N.Y. Exec. Law § 259-i(3)(f)(v) (2012).

127. N.Y. Crim. Proc. Law § 410.70(2) (McKinney 2005).

128. N.Y. Crim. Proc. Law § 410.70(3) (McKinney 2005); N.Y. Exec. Law § 259-i(3)(f)(iv)–(vi) (McKinney 2005 & Supp. 2007).

129. N.Y. Crim. Proc. Law § 410.70(5) (McKinney 2005); N.Y. Exec. Law § 259-i(3)(f)(ix) (McKinney 2005 & Supp. 2007).

130. N.Y. Crim. Proc. Law § 410.70(5) (McKinney 2005); N.Y. Exec. Law § 259-i(3)(f)(x) (McKinney 2005 & Supp. 2007).

131. N.Y. Exec. Law § 259-i(3)(h) (McKinney 2005 & Supp. 2008).

132. N.Y. Penal Law § 70.40(2) (McKinney 2004 & Supp. 2008).

133. N.Y. Correct. Law § 804(1) (McKinney 2003 & Supp. 2008).

As soon as you are eligible and request to be released, your sentence will be over—there is no post-release supervision. Accordingly, unlike prisoners released on parole or on conditional release, you will not have to sign a release agreement or worry about supervision or parole officers. Although both conditional and early release allow you to leave prison before serving your entire sentence, only early release also frees you from post-release supervision.

## H. Presumptive Release

In 2003, the New York state legislature enacted a new kind of release program called presumptive release.<sup>134</sup> In some ways, presumptive release is a lot like parole. The one major difference, however, is that presumptive release is designed to encourage the early release of model, well-behaving prisoners serving indeterminate sentences. That is, presumptive release is intended to be readily available for prisoners who have followed prison rules and participated in their assigned work and treatment programs. In addition, unlike parole, you do not have to appear before the Board of Parole to be released. Please take note, however, that this release program is scheduled to end on September 1, 2017.<sup>135</sup>

Although you do not have a right to demand presumptive release,<sup>136</sup> you may be eligible if you meet certain requirements. First, the presumptive release program is only available to prisoners serving one or more indeterminate sentences. Second, the presumptive release program is only available to prisoners serving sentences for non-violent crimes,<sup>137</sup> who have not committed any serious disciplinary infractions,<sup>138</sup> and who have not been deemed to have filed or continued frivolous (that is, not serious) legal complaints.<sup>139</sup>

### 1. Earned Eligibility Program

To be eligible for presumptive release, you must first receive a “certificate of earned eligibility.”<sup>140</sup> Whether you are serving an indeterminate or a determinate sentence, you should have been assigned a work and treatment program.<sup>141</sup> Two months before your earliest possible parole date, or at some point after that, the commissioner will review your record to determine whether you have complied with this program.<sup>142</sup> If the commissioner decides you have successfully participated in your program, he may issue you a certificate of earned eligibility.<sup>143</sup> This certificate will factor into your parole hearing and also play a key role in getting presumptive release.

### 2. Requesting Presumptive Release

To get presumptive release, you must (1) have a certificate of earned eligibility,<sup>144</sup> (2) not have been convicted of a violent offense,<sup>145</sup> (3) not have committed any serious disciplinary violations while in prison,

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134. N.Y. Correct. Law § 806 (McKinney 2003 & Supp. 2008). Please note that more information about the presumptive release program is available online. *See* New York State Department of Corrections and Community Supervision Programs, <http://www.dccs.ny.gov/ProgramServices/guidance.html#earn> (last visited Feb. 27, 2017).

135. This law is scheduled to expire on September 1, 2017. After this date, you should check for updates about the presumptive release program. Updates may be available online. *See* New York State Department of Corrections and Community Supervision Programs, <http://www.dccs.ny.gov/ProgramServices/guidance.html#earn> (last visited Feb. 27, 2017).

136. N.Y. Correct. Law § 806(5) (McKinney 2003 & Supp. 2008).

137. Under New York State law, a prisoner is not eligible for presumptive relief if he is presently serving a sentence for, or has been previously convicted of, the following violent crimes: (1) a Class A-I felony, (2) a violent felony offense under § 70.02 of the New York Penal Law, (3) manslaughter in the second degree, (4) vehicular manslaughter in the second or first degree, (5) criminally negligent homicide, (6) an offense in Article 130 of the New York Penal Law (“relating to sex offenses”), (7) incest, or (8) an offense defined in Article 263 of the New York Penal Law (“relating to the use of a child in a sexual performance”). N.Y. Correct. Law § 806(1)(i) (McKinney 2003 & Supp. 2008).

138. N.Y. Correct. Law § 806(1)(ii) (McKinney 2003 & Supp. 2008).

139. N.Y. Correct. Law § 806(1)(iii) (McKinney 2003 & Supp. 2008).

140. N.Y. Correct. Law § 806(1) (McKinney 2003 & Supp. 2008).

141. N.Y. Correct. Law § 805 (McKinney 2003 & Supp. 2007).

142. N.Y. Correct. Law § 805 (McKinney 2003 & Supp. 2007).

143. N.Y. Correct. Law § 805 (McKinney 2003 & Supp. 2007).

144. *See* N.Y. Correct. Law § 805 (McKinney 2003 & Supp. 2008).

145. Under New York state law, a prisoner is not eligible for presumptive relief if he is presently serving a sentence for, or has been previously convicted of, the following violent crimes: (1) a Class A-I felony, (2) a violent felony

and (4) not have filed any frivolous lawsuits.<sup>146</sup> In addition to these requirements, one final requirement is contingent on whether or not you have received merit-time credit. If you have received merit-time credit, you must have already served at least five-sixths of your minimum sentence (or total minimum sentences). If you have not received merit-time credit, you must have already served your entire minimum sentence (or total minimum sentences).<sup>147</sup>

The conditions of presumptive release are very similar to the conditions of parole or conditional release.<sup>148</sup> You will be subject to the supervision of the Board of Parole for the remainder of your sentence.

### I. Clemency and Commutation in New York

“Clemency” is a general term for the power of an executive officer (for example, the Governor of New York) to change the sentence of a criminal defendant to prevent injustice from occurring.<sup>149</sup>

There are several different types of clemency, including amnesty, reprieve, pardon, and commutation. A pardon attempts to clear a person’s name of a crime and restore their reputation. “Amnesty” refers to the official pardon of people who have been convicted of political offenses. A reprieve postpones a scheduled execution. Finally, a commutation substitutes a milder sentence for the current sentence being served.<sup>150</sup>

All forms of clemency are generally difficult to obtain. You may have a stronger chance at clemency, however, if you are a non-violent offender, or a woman who is in jail for killing an abusive partner. This Section focuses on clemency for battered women.<sup>151</sup> If you are not a battered woman and are still seeking clemency, the outlined procedures will still be helpful to you in preparing your petition. This is because the basic procedures for filing a good petition apply to all types of clemency petitions, even those that are not based on domestic abuse.

If you are currently seeking clemency for a death sentence, you may be entitled to a lawyer.<sup>152</sup> For more information on clemency in the State of New York, see “Guidelines for Review of Executive Clemency Applications,” which is on file in the law library of each correctional facility in New York.<sup>153</sup>

#### 1. Pardons

Pardons are different from commutations. A pardon is most commonly available if there is (1) overwhelming and convincing proof of your innocence that was not available at the time of your conviction, (2) a problem with the judgment of conviction in your case, or (3) a chance that you will be deported from the

offense under § 70.02 of the New York Penal Law, (3) manslaughter in the second degree, (4) vehicular manslaughter in the second or first degree, (5) criminally negligent homicide, (6) an offense in Article 130 of the New York Penal Law (“relating to sex offenses”), (7) incest, or (8) an offense defined in Article 263 of the Penal Law (“relating to the use of a child in a sexual performance”). N.Y. Correct. Law § 806(1)(i) (McKinney 2003 & Supp. 2008).

146. N.Y. Correct. Law § 806(1) (McKinney 2003 & Supp. 2008).

147. N.Y. Correct. Law §§ 806(1)–(2) (McKinney 2003 & Supp. 2008).

148. N.Y. Penal Law § 70.40(1)(c) (McKinney 2004 & Supp. 2008). Note that this law is scheduled to expire on September 1, 2017, and after this date, you must check for the new, updated version of this law.

149. New York State Department of Corrections and Community Supervision, Executive Clemency, [www.ny.gov/services/apply-clemency](http://www.ny.gov/services/apply-clemency) (last visited Feb. 27, 2017). In thirty-five states, including New York, the governor grants clemency. In other states either the governor and an advisory board, or an advisory board alone, makes the decision. The Mich. Women’s Clemency and Justice Project, Clemency for Battered Women in Michigan: A Manual for Attorneys, Law Students and Social Workers, ch. II-A, [http://www.umich.edu/~clemency/clemency\\_manual.html](http://www.umich.edu/~clemency/clemency_manual.html) (last visited Feb. 27, 2017).

150. The Mich. Women’s Clemency and Justice Project, Clemency for Battered Women in Michigan: A Manual for Attorneys, Law Students and Social Workers, ch. II-A, [http://www.umich.edu/~clemency/clemency\\_manual.html](http://www.umich.edu/~clemency/clemency_manual.html) (last visited Feb. 27, 2017).

151. For further information on clemency for battered women nationwide, contact the National Clearinghouse for the Defense of Battered Women, 125 S. 9th Street, Suite 302, Philadelphia, PA 19107, (215) 351-0010 or (800) 903-0111 extension 3. The Clearinghouse accepts collect calls from incarcerated battered women.

152. Federal law authorizes the courts in some instances to appoint lawyers for prisoners in capital cases facing death sentences who cannot afford lawyers. *See* 18 U.S.C. § 3599 (2012). In *Harbison v. Bell*, the Supreme Court held that the statute gives federal courts the power to appoint counsel to prisoners serving their sentences in federal and state prisons who cannot afford lawyers and who seek counsel in federal or state clemency proceedings. 556 U.S. 180, 185, 129 S. Ct. 1481, 173 L.Ed.2d 347 (2009).

153. N.Y. State Div. of Parole, New York State Parole Handbook: Questions and Answers Concerning Parole Release and Supervision (2010), [http://www.doccs.ny.gov/Parole\\_Handbook.html](http://www.doccs.ny.gov/Parole_Handbook.html) (last visited Feb. 27, 2017).

United States.<sup>154</sup> Usually a pardon is not available if you have any other administrative or legal remedy available to you.

## 2. Commutations

If you are granted a commutation, you can appear before the Board of Parole to be considered for a release on parole earlier than what your initial sentence would allow. When exceptional and compelling circumstances are not present, a commutation of sentence requires all of the following:

- (1) your minimum sentence is more than one year,
- (2) you have already served at least half of your minimum sentence,
- (3) you are ineligible for release on parole within one year of the date you apply for clemency, and
- (4) you are ineligible for release on parole at the discretion of the Board of Parole.<sup>155</sup>

In addition, you must be able to prove by clear and convincing evidence that one of the following three circumstances applies:

- (1) You have made “exceptional strides in self-development and improvement;” you have “made responsible use of available rehabilitative programs and [have] addressed identified treatment needs” (for example, by completing a drug program), and commutation of your sentence is “in the interest of justice, consistent with public safety and [with your] rehabilitation;”
- (2) You have a terminal illness or a “severe and chronic disability which would be substantially mitigated by release from prison and such release is in the interest of justice and consistent with public safety” (illnesses such as cancer and multiple sclerosis may qualify); or
- (3) “[F]urther incarceration would constitute gross unfairness because of the basic inequities involved.”<sup>156</sup>

## 3. How to Request a Pardon or Commutation

To be considered for clemency in New York, send a written petition requesting clemency to either of the following addresses:

The Governor of the State of New York  
Executive Chamber  
State Capitol  
Albany, NY 12224

Director, Executive Clemency Bureau  
N.Y. State Division of Parole  
97 Central Avenue  
Albany, NY 12206

After the Governor receives a petition requesting clemency, he or she then compiles the necessary information. The Governor generally grants a formal hearing to those seeking commutation of a death sentence. The Governor will review the information and make a decision. You should send all supporting application materials within thirty days of sending the petition. Petitions are typically considered in the order in which they are received.<sup>157</sup>

### (a) Organization of Your Petition

To organize your petition, you should write an introductory paragraph that explains the strongest reason why you deserve a pardon or commutation. For example, you could include special circumstances about your

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154. N.Y. State Dept. of Corrections and Community Supervision, Executive Clemency, *available at* <http://www.doccs.ny.gov/clemency.html> (last visited Feb. 27, 2017).

155. N.Y. State Dept. of Corrections and Community Supervision, Executive Clemency, *available at* <http://www.doccs.ny.gov/clemency.html> (last visited Feb. 27, 2017).

156. Criminal Justice Policy Foundation, New York Executive Clemency Fact Page, *available at* <http://www.cjpf.org/clemency-ny> (last visited Feb. 27, 2017).

157. Criminal Justice Policy Foundation, New York Executive Clemency Fact Page, <http://www.cjpf.org/clemency-ny> (last visited Feb. 27, 2017).

case or discuss significant things you have accomplished in prison. Make the petition as brief as possible, but make sure not to leave out any important information. Use headings to separate your points. Emphasize how you have spent your time in prison in order to illustrate self-development and character improvement. Write out in detail what you plan to do after you have been released (be sure to include how you will be moving into a stable environment, how you will support yourself, and who is included in your support network).

If you were the victim of domestic violence and the domestic violence is related to your conviction, consider making a table or list that includes the date of each incident of abuse, the nature of the abuse, and a description of any existing evidence that may help prove the incident(s).<sup>158</sup>

#### (b) Exhibits

In order to show strong character and good behavior, you should include evidence, such as letters of support from prison administrators, work supervisors, religious leaders, educators, and social workers. You should include this evidence as exhibits to your petition. If you were a victim of abuse, you should also include police and hospital records documenting the abuse.

To obtain police records, you should call or write to the records office in the county where the event happened. Different police departments have different policies and you may have to fill out a Freedom of Information Act (FOIA) request to get the records.<sup>159</sup> To obtain hospital records, call or write to the patient records office at the hospital where you went for treatment. A written request should include your name, date of birth, Social Security Number, the specific date or general time range of your hospitalization, and the specific information you are requesting.

If you were a victim of domestic violence abuse, and you were evaluated by an expert regarding battered women's syndrome, you should include that evaluation or testimony, as well as evidence of any violent criminal history of your abuser. Include any orders of protection and photographs showing physical injury from the abuse. You also want to attach affidavits or letters from friends, family members, and domestic violence workers who had first-hand knowledge of the abuse. An affidavit is a written statement made by a person that they then sign and swear to be true in front of someone authorized to administer an oath, such as a notary public. An affidavit can sometimes be used as evidence in court. You should refer to these exhibits in your petition, labeling and attaching them to the end of the petition.

#### (c) Obtaining Documents

Getting documents related to your case and your prison term will help you write your petition. Because you may have difficulty getting all of these documents while incarcerated, you should try to have a close friend or family member assist you in gathering this information and in developing your petition. For information on the Federal Freedom of Information Act (FOIA), the Federal Privacy Act (PA), and New York's Freedom of Information Law (FOIL), see *JLM*, Chapter 7, "Freedom of Information." *JLM*, Chapter 7 also includes a list of FOIA statutes in other states. You will want to obtain your DOCS records (records pertaining to the time you have spent in prison), your parole file, your case file, documentation of battering (if applicable), and affidavits or letters of support.

#### Your DOCS Records

Your DOCS records include:

- (1) All reports of misbehavior and supplemental sheets,
- (2) Physical force and unusual incident sheets,
- (3) Adjustment committee reports and dispositions,
- (4) Copy of legal dates,
- (5) Crimes of commitment,
- (6) Personal history record,
- (7) Disciplinary record,

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158. The Mich. Women's Clemency and Justice Project, *Clemency for Battered Women in Michigan: A Manual for Attorneys, Law Students and Social Workers*, ch. VII, [http://www.umich.edu/~clemency/clemency\\_manual.html](http://www.umich.edu/~clemency/clemency_manual.html) (last visited Feb. 27, 2017).

159. For more information, see *JLM* Chapter 7, "Freedom of Information."

- (8) Correctional supervision history,
- (9) Certificates of program completion, and
- (10) Recognition letters.

You have a right to this information under FOIA and New York's Personal Privacy Protection Law (PPPL),<sup>160</sup> but you must authorize release of these records if they are being sent to someone other than you. In order to obtain these documents, you should write to the prisoner records coordinator of your facility with your name, DOCS number, where you would like the records sent, and a list of the documents you want to receive. If the documents are being sent to someone other than you, you must state that you authorize that person to receive the documents you are requesting.

### Your Parole Records

You also have a right to your case record and parole file under FOIL and PPPL. The case record is the most complete set of records maintained by the Board of Parole and can be obtained by writing to the senior parole officer of your facility with your name, ID number, and release interview date, revocation hearing date, or appeal pending date, whichever applies. State that you want to review all the information in the file that will be considered by the Board of Parole to prepare for the upcoming date.

The parole file is a less complete record in the central office, and it can be obtained by writing to the following address:

Chairman of the Board of Parole  
97 Central Avenue  
Albany, NY 12206.

Be sure to state that you are requesting these records pursuant to FOIA and PPPL.

### Your Case file

The case file includes:

- (1) Police reports,
- (2) Grand jury minutes,
- (3) Indictment,
- (4) Pretrial hearings and motions,
- (5) Trial transcripts,
- (6) Summation,
- (7) Jury charge,
- (8) Jury requests/read backs,
- (9) Verdict,
- (10) Sentencing,
- (11) Plea allocutions of co-defendants,
- (12) Direct appeal appellate and response briefs,
- (13) Reply/supplemental brief,
- (14) Decision on appeal, and
- (15) Anything else of interest in the court file.

Ask your attorney for copies of these documents and transcripts. If you do not have an attorney or if your attorney does not have complete transcripts, you may need to call the criminal courthouse to obtain copies.

For your criminal record, send a request to:

Record Review Unit  
New York State Division of Criminal Justice Services Civil Identification Bureau  
4 Tower Place  
Albany, NY 12203.

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160. N.Y. Pub. Off. Law §§ 94–95 (McKinney 2008).

In your request, you should include your name, date of birth, Social Security Number, and Department Identification Number (D.I.N.). You can also ask them to rush process your request of your file if you need the information quickly. Otherwise, it can take eight weeks or longer to receive your criminal record. You should send the request in a facility envelope, if possible.

You also have a right to obtain pre-sentencing reports, though you may be asked to show a factual need for the reports.<sup>161</sup> To get them, send a written request addressed “To Whom It May Concern” to the Record Review Unit (see above address), with your name, birth date, indictment number, sentencing court, the address where you would like the information to be sent, and a signed release authorizing another person to receive the information, if necessary.

### Documentation of Battering

Documentation of battering should include:

- (1) Medical records of injuries from abuse;
- (2) Mental health records showing your diminished capacity at the time of the crime and/or the stress, fear and anxiety caused by living in a violent relationship;
- (3) Orders of protection;
- (4) Police reports related to the abuse; and
- (5) Photographs showing physical injury.

“Diminished capacity” means an unbalanced mental state that would make you less accountable for your actions. Try to obtain copies of any relevant records from hospitals, clinics, private doctors, or mental health clinicians, as well as police reports of incidents of domestic violence.

### Affidavits or letters of support

You should also include affidavits and letters of support in your petition. You can ask family members, friends, co-workers, doctors, neighbors, therapists, and other people involved in your life to submit an affidavit. You can also ask them to submit letters of support. The affidavit or letter of support should explain that you were battered and/or describe the crime. When you submit the affidavits or letters in your petition, you should state whether these people testified at your criminal trial.

## **J. Compassionate Release for Persons with Terminal Diseases**

Thirty-six states have programs that allow for the release of dying or seriously ill prisoners.<sup>162</sup> For example, California has a compassionate release procedure that allows the court to re-sentence or recall the sentence.<sup>163</sup> You must have an incurable illness that will produce death within six months or be permanently medically incapacitated (as determined by a physician employed by the Department of Corrections), and you must not pose a threat to public safety.<sup>164</sup> This does not apply if you are sentenced to death or to a term of life without the possibility of parole. If you are incarcerated in California and are interested in receiving a compassionate release, you or someone you designate should contact the chief medical officer of the prison or the Director of Corrections.<sup>165</sup>

Every state's rules are different, and many states have recently implemented new programs or are considering new legislation on this issue. For example, in 2008, North Carolina and Wyoming introduced new compassionate release programs.<sup>166</sup> If you have a serious or terminal illness or are elderly, you should check to see if your state has a compassionate release program.

New York State prisons also release some prisoners through medical parole.<sup>167</sup> To be eligible, you must have a terminal health condition or a significant and permanent non-terminal condition.<sup>168</sup> You must also be

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161. N.Y. Crim. Proc. Law § 390.50 (McKinney 2005).

162. Marty Roney, 36 States Release Ill or Dying Inmates, USA Today, Aug. 14, 2008 (listing states with a medical release program).

163. See Cal. Penal Code § 1170(e)(2) (LexisNexis 2015).

164. Cal. Penal Code § 1170(e)(2) (LexisNexis 2015).

165. Cal. Penal Code § 1170(e)(6) (LexisNexis 2015).

166. See N.C. Gen. Stat. § 15A-1369 (2014); Wyo. Stat. Ann. § 7-13-424 (iv) (2015).

167. N.Y. Exec. Law § 259-r (McKinney 2005 & Supp. 2008). See also N.Y. State Div. of Parole, New York State

so incapacitated or debilitated that there is a reasonable probability that you do not present a danger to society. To prove this, you must have a physician's certification that you are severely restricted in your ability to move around and to care for yourself.<sup>169</sup> In addition, the Commissioner of DOCS (or someone authorized by the Commissioner) must certify both the doctor's diagnosis and your incapacity. Officials will consider the length of and reason for your incarceration, as well as your criminal record. You are not eligible if you are serving a sentence for first- or second-degree murder, first-degree manslaughter, or any sex offense (defined by Article 130 of the New York Penal Law), or an attempt to commit any of these crimes.<sup>170</sup> Even if you are not eligible for medical parole because your initial parole eligibility date is past, you may be eligible for a full review of your case by the Board of Parole for medical reasons.<sup>171</sup>

The New York medical parole process has three steps.<sup>172</sup> First, you need a physician's certification to start the process.<sup>173</sup> To get this, you or someone acting on your behalf must make a request to the Commissioner of DOCS or the Division of Health Services that you be considered for medical parole.<sup>174</sup> If you are eligible, the Commissioner has discretion to order a medical evaluation and discharge plan. A physician employed by DOCS, or by a medical facility used by DOCS, can perform the evaluation. During the evaluation, the physician will make observations on the following: the disease, syndrome, or terminal condition you suffer from; the likelihood of your recovery; the extent of your debilitation or physical incapacity and its possible duration; the medications and dosages you are currently taking; and your ability to administer them to yourself.<sup>175</sup>

The second step begins when the medical evaluation report plan is sent to the Associate Commissioner, who will advise the Commissioner whether you meet the criteria for medical parole. The Associate Commissioner will determine whether you are "so debilitated or incapacitated as to create a reasonable probability that [you are] physically incapable of presenting any danger to society."<sup>176</sup> If the Commissioner decides that you meet the criteria for medical parole, the matter is referred to the Board of Parole for consideration. At that time, the Central Health Services staff and the correctional facility will begin to prepare a medical discharge plan. The medical discharge plan includes information on the level of care you will need, a description of special equipment or transportation needs, a description of your participation in the discharge plan, home-care plans if applicable, a description of any support needed by you or your caregiver, a report on the status of applications for Public Assistance or Medicaid, and a report on the status of

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Parole Handbook: Questions and Answers Concerning Parole Release and Supervision, Medical Parole Section, [http://www.doocs.ny.gov/Parole\\_Handbook.html](http://www.doocs.ny.gov/Parole_Handbook.html) (last visited Feb. 27, 2017); State of New York, Department of Correctional Services, Directive No. 4304, Medical Parole (2011), <http://www.doocs.ny.gov/Directives/4304.pdf> (last visited, Feb. 27, 2017).

168. See State of New York, Department of Correctional Services, Directive No. 4304, Medical Parole (2011), <http://www.doocs.ny.gov/Directives/4304.pdf> (last visited Feb. 27, 2017).

169. State of New York, Department of Correctional Services, Directive No. 4304, Medical Parole (2011), <http://www.doocs.ny.gov/Directives/4304.pdf> (last visited Feb. 27, 2017).

170. See State of New York, Department of Correctional Services, Directive No. 4304, Medical (2011), <http://www.doocs.ny.gov/Directives/4304.pdf> (last visited Feb. 27, 2017); N.Y. Exec. Law § 259-r(1)(a) (McKinney 2005 & Supp. 2008). Note that New York Executive Law § 259-r is scheduled to expire on September 1, 2017, and after this date, you must check for the new, updated version of this law.

171. State of New York, Department of Correctional Services, Directive No. 4304, Medical Parole (2011), <http://www.doocs.ny.gov/Directives/4304.pdf> (last visited Feb. 27, 2017).

172. See John A. Beck, *Compassionate Release from New York State Prisons: Why Are So Few Getting Out?*, 27 J.L. Med. & Ethics 216, 227–231 (1999) (explaining the process and problems with compassionate release in New York).

173. Physicians in the prison system can also initiate the request for you. See State of New York, Department of Correctional Services, Directive No. 4304, Medical Parole (2011), <http://www.doocs.ny.gov/Directives/4304.pdf> (last visited Feb. 27, 2017) (stating that someone acting on the prisoner's behalf or a department employee may also make the request).

174. See State of New York, Department of Correctional Services, Directive No. 4304, Medical Parole (2011), <http://www.doocs.ny.gov/Directives/4304.pdf> (last visited Feb. 27, 2017).

175. State of New York, Department of Correctional Services, Directive No. 4304, Medical Parole (2011), <http://www.doocs.ny.gov/Directives/4304.pdf> (last visited Feb. 27, 2017); N.Y. Exec. Law § 259-r(2)(a) (McKinney 2005 & Supp. 2008).

176. N.Y. Exec. Law § 259-r(2)(b) (McKinney 2005 & Supp. 2008).

applications for institutional placement. If it appears that you are in need of Public Assistance, an application will be sent to the Department of Social Services.<sup>177</sup>

If you can get both the physician's certification and the Commissioner's certification, and there is no other reason you would be ineligible, you may receive compassionate release, also called medical parole. Getting through the third phase of formal review by the Board of Parole, however, can be very difficult because the process has many steps and can be time-consuming. The judge who sentenced you, the District Attorney, and the attorney who represented you will all be notified that you might receive parole, and they can each submit comments within fifteen days.<sup>178</sup> Additionally, DOCS must provide "an appropriate medical discharge plan" to the Board of Parole.<sup>179</sup> The Board must assess whether, considering your medical condition, it is reasonably possible you will live outside of prison without breaking the law. It must also consider whether letting you out on such a release might be harmful to society, or will go against society's idea of fairness, taking into account the seriousness of your crime. The Board must also consider whether your release will "undermine respect for the law."<sup>180</sup> The process can take months, so it is very important to start it as soon as you become eligible.

If parole is ultimately granted, the health services staff will send copies of all appropriate medical records to the physician or facility that will care for you. Once you are released, you must get medical care as appropriate and remain under the care of a physician.<sup>181</sup> Every six months after your release, the Board will review your case, deciding whether to let you stay out of prison by renewing the grant of parole.<sup>182</sup> Each time, you will need to submit to a medical examination.<sup>183</sup>

## K. Federal Sentences

This Section outlines the four different ways that you can be released early from your federal sentence.

First, you can earn credit for time you served in prison prior to beginning your sentence. To learn more about what types of time previously served can be used to shorten your sentence, see Section L of this Chapter, which describes this option in more detail.

Second, you may be able to reduce your sentence by helping the government investigate or prosecute other people. There is no guarantee, however, that your sentence will be reduced if you provide such assistance. Even if your sentence is reduced, it is up to the court to decide the level of reduction. To determine if you are eligible for this type of reduction, see Section M of this Chapter, which explains this option in more detail.

Third, the Bureau of Prisons ("BOP") can shorten your sentence by (1) awarding you "good conduct time credits," (2) granting you early release for participation in a Residential Drug Abuse Program (RDAP), (3) granting you early release under the Second Chance Act, or (4) granting you compassionate relief. To determine if you are eligible for these programs, learn how to apply for these programs, and understand their potential effect on your sentence, see Section N of this Chapter.

Finally, in very rare cases, the President of the United States can grant you executive clemency, which releases you from your prison sentence and/or your term of supervised release. The President can also forgive your crime after you have finished serving your sentence, and have shown remorse and rehabilitation. Federal executive clemency is discussed in Section P of this Chapter.

This Part also explains federal supervised release. Federal supervised release is an additional sentence that a judge can impose that you must serve after you complete your prison sentence. During a period of federal supervised release your conduct will be monitored by a probation officer to make sure that you do not violate any of the conditions of your supervised release. Federal supervised release and its conditions can be

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177. State of New York, Department of Correctional Services, Directive No. 4304, Medical Parole (2011), <http://www.doccs.ny.gov/Directives/4304.pdf> (last visited Feb. 27, 2017).

178. N.Y. Exec. Law § 259-r(1)(c) (McKinney 2005 & Supp. 2008).

179. N.Y. Exec. Law § 259-r(2)(c) (McKinney 2005 & Supp. 2008).

180. N.Y. Exec. Law § 259-r(1)(b) (McKinney 2005 & Supp. 2008).

181. N.Y. Exec. Law § 259-r(4)(b) (McKinney 2005 & Supp. 2008).

182. N.Y. Exec. Law § 259-r(4)(a), (e) (McKinney 2005 & Supp. 2008). *See also* N.Y. State Div. of Parole, New York State Parole Handbook: Questions and Answers Concerning Parole Release and Supervision (2010), [http://www.doccs.ny.gov/Parole\\_Handbook.html](http://www.doccs.ny.gov/Parole_Handbook.html) (last visited Feb. 27, 2017).

183. N.Y. Exec. Law § 259-r(4)(d) (McKinney 2005 & Supp. 2008).

revoked, terminated, or modified, which could result in your being sentenced to an additional term of imprisonment. Section O of this Chapter explains federal supervised release in more detail.

#### L. Credit for Time Served

You can earn credit both for (1) time spent serving your current federal sentence, and (2) for time spent serving in prison after the date you committed your current federal offense but before you began serving your current sentence. The amount of time that is credited towards your sentence for “time served” is determined by the Attorney General or the BOP after the district court announces your sentence.<sup>184</sup> District courts cannot directly order that time previously served be credited to reduce the length of your current sentence. You can challenge the amount of time credited towards your sentence only after exhausting the administrative remedies available with the BOP.<sup>185</sup>

You can only earn credit for time spent in official detention. The Supreme Court has ruled that “official detention” means time spent under federal detention.<sup>186</sup> This does not include time on release, like on bail or under house arrest. The BOP interprets *Reno v. Koray* to mean that you are “not entitled to any time credit off the subsequent sentence, regardless of the severity or degree of restrictions, if such release was a condition of bond or release on own recognizance, or as a condition of parole, probation or supervised release.”<sup>187</sup> You can still receive credit, however, for time spent in a community treatment center or lower security placement if it is ordered as a condition of your presentence detention or because of overcrowding in federal facilities.<sup>188</sup>

There are three types of credit that can count against your sentence as time served:

- (1) time actually spent serving a federal sentence;
- (2) time previously served; and
- (3) time in non-federal pre-detention custody when you are denied bail under a federal detainer.<sup>189</sup>

The first category—time actually spent serving a federal sentence—refers to the time spent serving your current federal sentence. Your federal sentence does not begin until the date you are “received in custody awaiting transportation to,” *or* until you arrive voluntarily to begin serving your sentence at, the official facility where you will be serving your federal sentence.<sup>190</sup> The time you serve can be reduced even further if you obtain good conduct time credits<sup>191</sup> and/or early release under the Residential Drug Abuse Program (RDAP).<sup>192</sup>

The second category—time previously served—allows credit to be applied for time previously served in official detention (state, foreign, or federal) before the date when your federal sentence began. In general, credit can apply from time that you spent in detention for (1) your current offense prior to sentencing, or (2) any other offense for which you were arrested after you committed the current offense, provided that the time has not been credited against another sentence.<sup>193</sup> For example, you can include the time you spent in federal custody after arrest on your federal charge.<sup>194</sup> This includes the time spent in federal custody before sentencing, including time spent in state proceedings.<sup>195</sup>

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184. *United States v. Wilson*, 503 U.S. 329, 333, 112 S. Ct. 1351, 1353–54, 117 L. Ed. 2d 593, 599 (1992).

185. *United States v. Whaley*, 148 F.3d 205, 207 (2d Cir. 1998) (holding that a district court does not have jurisdiction to hear a prisoner’s appeal to a sentencing determination until the prisoner has requested review with the BOP and exhausted all of his administrative remedies).

186. *Reno v. Koray*, 515 U.S. 50, 61, 115 S. Ct. 2021, 2027, 132 L. Ed. 2d 46, 57 (1995) (holding that the time spent by the plaintiff in a community treatment center while on bail would not be credited against his federal sentence, as he was on release and thus not in official detention).

187. Fed. Bureau of Prisons, 5880.28 at 1-14H, Program Statement (1997), available at [http://www.bop.gov/policy/progstat/5880\\_028.pdf](http://www.bop.gov/policy/progstat/5880_028.pdf) (last visited Feb. 27, 2017).

188. Fed. Bureau of Prisons, 5880.28 at 1-14F, Program Statement (1997), available at [http://www.bop.gov/policy/progstat/5880\\_028.pdf](http://www.bop.gov/policy/progstat/5880_028.pdf) (last visited Feb. 27, 2017).

189. *Gross v. Berkbile*, No. 7:CV-00095-KKC, 2011 U.S. Dist. LEXIS 620, at \*7 (E.D. Ky. Jan. 4, 2011); *Stackpole v. Williamson*, No. 3:CV-07-0396, 2007 U.S. Dist. LEXIS 54992, at \*6–7 (M.D. Penn. July 30, 2007).

190. 18 U.S.C. § 3585(a) (2012).

191. 18 U.S.C. § 3624(b) (2012).

192. 18 U.S.C. § 3621(e)(2)(B) (2012).

193. 18 U.S.C. § 3585(b) (2012).

194. In *Jonah R. v. Carmona*, the Ninth Circuit applied these provisions to grant juveniles credit for time spent in

You may also be able to receive credit for a second category of time served: that is, the time (after your federal offense) that you spent in custody serving another sentence that was not and will not be counted towards any sentence. For example, if you were serving time in official detention for a state or foreign sentence that was later vacated and you were not re-sentenced, you can include this time. Likewise, if you were serving a federal, state, or foreign sentence that was vacated and you were re-sentenced to a period shorter than that which you already served, the extra time beyond time already served on that sentence can be applied to your federal sentence.<sup>196</sup>

If you were arrested for a different offense *after* you committed the offense for which you were sentenced, and you spent time in official detention for that different offense, you can receive credit for that time you spent in detention prior to receiving the sentence you are now serving.<sup>197</sup> You can also receive credit for time in a state facility when a federal court ordered that your federal and state sentences run “concurrently” (at the same time). Only a federal court can order that a federal and state sentence run concurrently, but a state court can suggest that a federal and state sentence run concurrently. While a state court decision may recommend that your state and federal sentences run concurrently, federal courts have held that federal authorities do not need to follow the state’s recommendation. Therefore, any time spent serving the state sentence in a state facility while waiting for transport or transfer to the federal facility will *not* necessarily be credited against your sentence as time already served.<sup>198</sup> However, if you are first convicted in state court and later convicted in federal court, the federal court can order that your sentences run concurrently (at the same time), starting on the date that the federal sentence is announced or imposed by the court.<sup>199</sup> The federal court must specifically state that the federal sentence is to run concurrently with your state sentence, or it will automatically run consecutively.<sup>200</sup> Only the time that you remained in state prison after the federal sentence was pronounced can be credited towards your federal sentence.

Note that you cannot “double count” credit for any previous time served in state or federal prison that has already been counted against your state sentence or a different federal sentence.<sup>201</sup> This rule includes time spent on detainer related to your trial and prosecution for unrelated federal charges,<sup>202</sup> as well as time served in federal pre-sentence custody that has been credited to your state sentence.<sup>203</sup> A district court

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pre-detention custody. 446 F.3d 1000, 1010 (9th Cir. 2006).

195. Fed. Bureau of Prisons, Program Statement 5880.28, at 1-16 to 1-16A (1997), *available at* [http://www.bop.gov/policy/progstat/5880\\_028.pdf](http://www.bop.gov/policy/progstat/5880_028.pdf) (last visited Feb. 27, 2017).

196. Fed. Bureau of Prisons, Program Statement 5880.28, at 1-17 (1997), *available at* [http://www.bop.gov/policy/progstat/5880\\_028.pdf](http://www.bop.gov/policy/progstat/5880_028.pdf) (last visited Feb. 27, 2017).

197. 18 U.S.C. § 3585(b)(2) (2012) (allowing you to receive credit toward a sentence for any time spent in official detention *prior* to the date a new sentence commences, when your original detention time was the result of any other charge for which you were arrested *after* the commission of the offense for which you are now sentenced. So, if you were serving an official sentence for a crime you committed one year ago, and then were sentenced for a crime that you committed 2 years ago, the time you have served for the more recent crime can be applied to the sentence for the older crime for which you are just now being sentenced.).

198. *Leal v. Tombone*, 341 F.3d 427, 429 (5th Cir. 2003) (holding that federal authorities are not required to follow state recommendations for state and federal sentences to run concurrently and therefore are under no obligation to credit time served in state prison that could have been served in federal prison if authorities had chosen to commence transfer earlier (citing *Taylor v. Sawyer*, 284 F.3d 1143 (9th Cir. 2002) and *Bloomgren v. Belaski*, 948 F.2d 688, 690–91 (10th Cir. 1991)).

199. 18 U.S.C. § 3584(a) (2012); *Carmona v. Williamson*, 226 F. App’x. 240, 241 (3d Cir 2007) (holding that the time a plaintiff served in state prison before being given his federal sentence could not be credited against the federal sentence).

200. 18 U.S.C. § 3584(a) (2012).

201. *Carmona v. Williamson*, 226 F. App’x. 240, 241 (3d Cir 2007).

202. *United States v. Mills*, 501 F.3d 9, 11–12 (1st Cir. 2007) (holding that the 365 days that plaintiff served in state prison that had been credited against his state sentence could not also be credited against his federal sentence where the federal detainer was completely unrelated to the reason he was in state custody).

203. *United States v. Storm*, 2007 U.S. Dist. LEXIS 57019, at \*4 (D. Utah Aug. 2, 2007) (finding plaintiff not entitled to credit for time served in official detention prior to commencing his federal sentence when this same pre-custody time was already counted towards his state sentence), *vacated on other grounds in*, 2008 U.S. App. LEXIS 13024 (10th Cir. June 16, 2008).

cannot apply credits for time previously served to your federal sentence; only the Attorney General of the United States can do this, although the Attorney General may authorize the BOP to do so as well.<sup>204</sup>

The third category—called “Willis time credits”—covers time served in non-federal pre-detention custody when you were denied bail because you were being detained on separate charges by the federal government.<sup>205</sup> You may be eligible for Willis time credits if you are sentenced to concurrent federal and state sentences, and your estimated federal release date is the same or later than your estimated state release date, without any reduction credits applied. In this scenario, you will earn Willis time credits for the time you spent in non-federal pre-sentence custody after the date that the federal offense you are charged with occurred, to the date that your first sentence began (either the federal or state sentence, whichever started earlier).<sup>206</sup> You cannot obtain any Willis time credits if you are released from your state sentence before your federal sentence begins and the pre-sentence time was credited against your state sentence.<sup>207</sup>

However, if your estimated federal release date, without any reduction credits applied, is earlier than your state estimated release date, then you may still be eligible for a reduction.<sup>208</sup> A court has held that the BOP’s decision to only apply pre-sentence credits to longer non-federal sentences was unreasonable.<sup>209</sup> When the amount of time in the credit is longer than the amount of time separating the federal and state sentences, the court orders the pre-sentence time to first apply against the state sentence and then to reduce the federal sentence to match the length of the newly calculated state sentence.<sup>210</sup>

### M. Substantial Assistance Prosecuting Others

A second way that you may be released early from prison is by providing substantial help to the government to investigate or prosecute other people. Depending on how much help you provide, the judge can significantly reduce your sentence—the judge can even reduce your sentence below the statutory minimum.<sup>211</sup> Keep in mind, however, that there is no guarantee that your sentence will be reduced: the court may decide to keep your original sentence.<sup>212</sup>

If you think you might be able to help the government in this way and want to try to reduce your sentence, you should talk to the government about this as soon as possible after your sentencing. For you to be eligible for this reduction, the government must first file a motion with your sentencing judge, asking the judge to reduce your sentence.<sup>213</sup> If the government files this motion within a year of your sentencing,<sup>214</sup> the judge will just consider whether you gave “substantial assistance in investigating or prosecuting another

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204. In *United States v. Wilson*, the Supreme Court held that credit for time already served under 18 U.S.C. § 3585(b) cannot be granted by the court, but only by the U.S. Attorney General (or the BOP, acting pursuant to the Attorney General’s orders) and only after the prisoner has begun serving his sentence. 503 U.S. 329, 334–35, 112 S. Ct. 1351, 1354–55, 117 L. Ed. 2d 593, 599–601 (1992); *see also* *United States v. Peters*, 470 F.3d 907, 909 (9th Cir. 2006) (reaffirming *Wilson*’s holding that only the Attorney General, and not the district court, has the authority to grant prisoners credit for time served).

205. These credits are named after a case, *Willis v. United States*, 438 F.2d 923, 925 (5th Cir. 1971) (holding that defendant was entitled to credit for time served in state pre-sentence custody because this time was related to his federal offense where defendant was denied release on bail because of the federal detainer lodged against him).

206. Fed. Bureau of Prisons, Program Statement 5880.28, at 1-22 (1997), *available at* [http://www.bop.gov/policy/progstat/5880\\_028.pdf](http://www.bop.gov/policy/progstat/5880_028.pdf) (last visited Feb. 27, 2017).

207. Fed. Bureau of Prisons, Program Statement 5880.28, at 1-22 (1997), *available at* [http://www.bop.gov/policy/progstat/5880\\_028.pdf](http://www.bop.gov/policy/progstat/5880_028.pdf) (last visited Feb. 27, 2017).

208. *Kayfez v. Gazele*, 993 F.2d 1288, 1290 (7th Cir. 1993) (finding unreasonable the BOP’s decision to only apply credits for pre-sentence time to the longer non-federal sentence even where the amount of time in the credit was longer than the amount of time separating the federal and non-federal sentences, and instead ordering the pre-sentence time be applied against the non-federal sentence and then applied to reduce the federal sentence to match the length of the newly calculated non-federal sentence); *see also* Fed. Bureau of Prisons, Program Statement 5880.28, at 1-22 (1997), *available at* [http://www.bop.gov/policy/progstat/5880\\_028.pdf](http://www.bop.gov/policy/progstat/5880_028.pdf) (last visited Feb. 27, 2017).

209. *Kayfez v. Gazele*, 993 F.2d 1288, 1290 (7th Cir. 1993).

210. *Kayfez v. Gazele*, 993 F.2d 1288, 1290 (7th Cir. 1993). Fed. Bureau of Prisons, Program Statement 5880.28, at 1-22 (1997), *available at* [http://www.bop.gov/policy/progstat/5880\\_028.pdf](http://www.bop.gov/policy/progstat/5880_028.pdf) (last visited Feb. 27, 2017).

211. Fed. R. Crim. P. 35(b)(4).

212. Fed. R. Crim. P. 35(b).

213. Fed. R. Crim. P. 35(b)(1) & (2).

214. As used in this rule, “sentencing” means the oral announcement of the sentence. *See* Fed. R. Crim. P. 35(c).

person.”<sup>215</sup> If you wait more than a year after sentencing before you help the government, it will be harder to get your sentence reduced and you may no longer be eligible. In this situation, the judge can only reduce your sentence if you also meet one of the following three requirements:<sup>216</sup>

- (1) You did not know about the information until a year or more after your sentencing;
- (2) You told the government the information within one year of your sentencing but the information was not useful to the government until more than a year after your sentencing; or
- (3) You had the information but did not realize it would be useful to the government until more than one year after your sentencing. As soon as you realized it was useful, you told the government the information.

You should be aware that even if you help the government, you are not guaranteed a reduced sentence. It is entirely up to the government whether you are eligible for this reduction. Unless the government files a motion asking the judge to reduce your sentence, the judge cannot reduce your sentence.<sup>217</sup> In addition, you should speak directly with a federal prosecutor about the possibility of obtaining a sentence reduction in exchange for information. Prison wardens and other BOP officials are not government officials and cannot file a motion with the court asking for a sentence reduction.<sup>218</sup>

## N. Additional Ways the BOP Can Shorten a Federal Sentence

In addition to earning credit for time served and substantially helping the government prosecute others, you may receive early release through one of four BOP programs. First, you can earn good conduct time credits that can be used to reduce your sentence. Second, you may be eligible for early release after participation in a Residential Drug Abuse Program (RDAP). Third, you may be eligible for early release under the Second Chance Act. Finally, you may be eligible for compassionate relief. Keep in mind, however, that it is difficult to obtain compassionate relief, which is only awarded in the most extraordinary circumstances. Each of the next subsections discusses these programs in more detail.

### 1. Good Conduct Time Credits

Federal good conduct time is similar to the state good-time credit discussed above in Parts C(2) and D of this Chapter. If you are serving a sentence of more than one year, but less than life imprisonment, you can earn up to fifty-four days of good conduct time credits for each year served of your sentence. These will be subtracted from your total sentence.<sup>219</sup>

#### (a) How to Earn Good Conduct Time Credit

Good conduct time credits are awarded for “exemplary compliance with institutional disciplinary regulations,” or successfully following prison rules.<sup>220</sup> Credits are awarded at the BOP’s discretion at the end of each year.<sup>221</sup> If you have not followed prison rules, you may receive fewer credits or no credits at all in any given year.<sup>222</sup>

#### (b) Amount of Good Conduct Time Credit You Can Earn

The amount of good conduct time you can earn depends on the date you committed your offense. If you committed your offense on or after November 1, 1987, but before September 13, 1994, you can earn up to fifty-four days credit towards serving your sentence for each year of your sentence served.<sup>223</sup> If you committed your offense on or after September 13, 1994, but before April 26, 1996, your good-time credits will

215. Fed. R. Crim. P. 35(b)(1).

216. Fed. R. Crim. P. 35(b)(2)(A)–(C).

217. *United States v. Mulero-Algarin*, 535 F.3d 34, 38 (1st Cir. 2008) (holding that only the government—not a judge—has the power to make a prisoner eligible for a sentencing reduction for substantial assistance).

218. *United States v. Ellis*, 527 F.3d 203, 207–09 (1st Cir. 2008) (holding that a warden within the BOP was unauthorized to make the motion as the “government” under Rule 35(b)).

219. 18 U.S.C. § 3624(b)(1) (2012).

220. 18 U.S.C. § 3624(b)(1) (2012).

221. 18 U.S.C. § 3624(b)(1) (2012).

222. 18 U.S.C. § 3624(b)(1) (2012).

223. 28 C.F.R. § 523.20(a) (2016).

be applied towards your sentence if you have a high school diploma, a General Educational Development (GED) credential, or are making satisfactory progress toward your GED.<sup>224</sup>

If you are serving a sentence for an offense you committed on or after April 26, 1996, and you do not have a high school diploma or a GED, the amount of days of credit you can earn in a year depends on whether you are making satisfactory progress towards receiving a GED. The education department at your prison will decide whether you are making satisfactory or unsatisfactory progress towards obtaining your GED.<sup>225</sup> If you have a GED or are making satisfactory progress towards obtaining one, then you can earn up to fifty-four credits for each year served.<sup>226</sup> If you do not have a GED and are not making satisfactory progress towards obtaining one, then you can only receive up to forty-two days of credit for each year served.<sup>227</sup> You can change your progress status during the year from unsatisfactory to satisfactory and become eligible for the full fifty-four credits if you begin making satisfactory progress toward receiving a GED.<sup>228</sup>

If you are serving a sentence longer than 366 days, then after 366 days in prison the BOP will decide how many of the fifty-four possible credits you have earned for that year.<sup>229</sup> Any of the possible credits that you did not earn that year are lost and you cannot earn them back in the following year(s).<sup>230</sup> One year later, the BOP will review your case again to determine how many credits you have earned for the 365 days you served since the last good conduct time credit assessment. This process will repeat every year until you have less than 365 days left to serve on your sentence. When you are one year away from your estimated release date, after taking into account the amount of good conduct time credits that you have earned, the amount of credits you can earn is prorated.<sup>231</sup> Prorated means proportioned for the remaining days you have left to serve in that year by applying the “GCT formula.”<sup>232</sup> These credits should be credited to you within the last six weeks of your sentence.<sup>233</sup> However, your good-time credits are not secure until you are actually released from prison.<sup>234</sup> Therefore, you can lose your good-time credits for the current year and all previous years up until your actual release from prison,<sup>235</sup> as described in the next Section of this Chapter. If you do, your estimated release date will be recalculated and you will lose the benefit of your good conduct time credits.<sup>236</sup>

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224. 28 C.F.R. § 523.20(b) (2016).

225. Fed. Bureau of Prisons, Program Statement 5884.03, at 3 (2006), *available at* [http://www.bop.gov/policy/progstat/5884\\_003.pdf](http://www.bop.gov/policy/progstat/5884_003.pdf) (last visited Feb. 27, 2017).

226. 28 C.F.R. § 523.20(c)(1) (2016).

227. 28 C.F.R. § 523.20(c)(2) (2016).

228. Fed. Bureau of Prisons, Program Statement 5884.03, at 3-4 (2006), *available at* [http://www.bop.gov/policy/progstat/5884\\_003.pdf](http://www.bop.gov/policy/progstat/5884_003.pdf) (last visited Feb. 27, 2017).

229. Fed. Bureau of Prisons, Program Statement 5880.28, at 1-78R (1998), *available at* [http://www.bop.gov/policy/progstat/5880\\_028.pdf](http://www.bop.gov/policy/progstat/5880_028.pdf) (last visited Feb. 27, 2017).

230. Fed. Bureau of Prisons, Program Statement 5880.28, at 1-78R (1998), *available at* [http://www.bop.gov/policy/progstat/5880\\_028.pdf](http://www.bop.gov/policy/progstat/5880_028.pdf) (last visited Feb. 27, 2017).

231. 18 U.S.C. § 3624(b)(1) (2006).

232. Fed. Bureau of Prisons, Program Statement 5880.28(3)(g), at 1-44–1-47 (1992), [http://www.bop.gov/policy/progstat/5880\\_028.pdf](http://www.bop.gov/policy/progstat/5880_028.pdf) (last visited Feb. 27, 2017). The GCT formula is used to ensure that the amount of time served plus the amount of GCT granted exactly equals the number of days in your total sentence. The GCT formula is applied by multiplying the number of days in your sentence by 0.148. For example, if your sentence is one year and one day (the minimum length to be eligible for good conduct time credits), you cannot earn 54 days for that year, because after subtracting 54 GCT days from your sentence, you will not have served 365 days, and therefore could not have earned the full 54 days allowed per year of time served. Instead, the maximum amount of good conduct time days you can earn for a sentence of one year and one day using the GCT formula is 47 days. Fed. Bureau of Prisons, Program Statement 5880.28, at 1-47 (1992), [http://www.bop.gov/policy/progstat/5880\\_028.pdf](http://www.bop.gov/policy/progstat/5880_028.pdf) (last visited Apr. 7, 2013). To determine how many days of good conduct time you could earn based on how many days are left to be served on your sentence, see Fed. Bureau of Prisons, Program Statement 5880.28, at 4-1–4-6, (1992), [http://www.bop.gov/policy/progstat/5884\\_003.pdf](http://www.bop.gov/policy/progstat/5884_003.pdf) (last visited Apr. 7, 2013).

233. 18 U.S.C. § 3624(b)(1) (2012).

234. Fed. Bureau of Prisons, Program Statement 5880.28, at 1-78S (1998), [http://www.bop.gov/policy/progstat/5880\\_028.pdf](http://www.bop.gov/policy/progstat/5880_028.pdf) (last visited Feb. 27, 2017).

235. Fed. Bureau of Prisons, Program Statement 5880.28, at 1-78S (1998), [http://www.bop.gov/policy/progstat/5880\\_028.pdf](http://www.bop.gov/policy/progstat/5880_028.pdf) (last visited Feb. 27, 2017).

236. *See* Prison Litigation Reform Act of 1996, Pub. L. No. 104-134, § 809, 110 Stat. 1321 (1996); 28 U.S.C. § 1932 (2012).

## (c) Loss of Good Conduct Time Credit

If you violate prison regulations or bring an unfounded (or “frivolous”) lawsuit,<sup>237</sup> you may lose unvested good conduct time credit as punishment.<sup>238</sup> Federal statute defines an unfounded claim as a claim (1) that was filed for a malicious (“bad”) purpose; (2) that was filed solely to harass (“annoy”) the party against which it was filed; or (3) where the prisoner testifies falsely or otherwise knowingly presents false evidence or information to the court.<sup>239</sup> This Chapter does not discuss the consequences of bringing a frivolous lawsuit, so you *must* read *JLM*, Chapter 14, “The Prison Litigation Reform Act,” for more information about this possibility.

Note, though, that you cannot lose your good conduct time credits if they have already vested; that is, if your offense was committed on or after November 1, 1987 but before September 13, 1994, *or* your offense was committed on or after September 13, 1994, but before April 26, 1996 and you have made satisfactory progress in obtaining your GED. If your offense occurred on or after April 26, 1996, your credits have not already vested (that is, been credited and applied against your sentence) and will not vest until your release. Therefore, you can lose good conduct time credits as a result of committing a prohibited act.<sup>240</sup>

Before the BOP can take away your good conduct time credits for alleged misconduct, there are several steps that the staff at your institution must take. First, a staff member who believes that you have violated prison regulations must file an Incident Report with a lieutenant.<sup>241</sup> A staff member will then investigate the incident.<sup>242</sup> At the beginning of the investigation, you should be given a copy of the Incident Report.<sup>243</sup> After you receive an Incident Report, the investigator will tell you what you are being charged with, provide you with a written copy of the charges, and ask for your statement on the incident. You can choose to give or not give a statement. Your silence can be used as evidence to show that you broke the rule, but it is not enough alone to prove that you broke the rule.<sup>244</sup>

Next, the United Discipline Committee (UDC) will conduct an initial hearing. After the BOP becomes aware of your involvement, the hearing will normally occur within five business days, not counting the day the incident report was issued, weekends, and holidays.<sup>245</sup> You generally have a right to be present at the UDC’s hearing unless your presence would threaten the prison’s security.<sup>246</sup> You also have the right to present evidence and make a statement on your own behalf at this hearing.<sup>247</sup> The UDC can find: (1) that you committed the prohibited act charged in the incident report; (2) that you did not commit the prohibited act charged in the incident report; (3) if the act you are charged with is considered very serious, the UDC may refer the incident report to the Discipline Hearing Officer (DHO) for further review; and (4) if the act you are charged with is considered a “Greatest” or “High” severity prohibited act, then the UDC will automatically refer the incident report to the DHO for further review.<sup>248</sup> The UDC’s decision must be based on “some evidence”<sup>249</sup> that you either did or did not break the rule. You should receive a written copy of the UDC decision following its review of the incident report.<sup>250</sup>

237. 28 U.S.C. § 1932 (2012).

238. 28 U.S.C. § 1932 (2012).

239. 28 U.S.C. § 1932 (2012).

240. 28 C.F.R. § 541.4(b) (2016); *see also* 28 C.F.R. § 541.3 (2016) (listing prohibited actions). Examples of actions that can result in the loss of good-time credits include: assaulting another person, escape from an escort or institution, fighting with another person, possession of a weapon, use of illegal drugs, engaging in sexual acts, stealing, refusing to take a drug or alcohol test, refusing to work or obey an order, gambling, being unsanitary or unclean, and using obscene language. 28 C.F.R. § 541.3 (2016).

241. 28 C.F.R. § 541.5(a) (2016); Fed. Bureau of Prisons, Program Statement 5270.09, at 17 (2011), [http://www.bop.gov/policy/progstat/5270\\_009.pdf](http://www.bop.gov/policy/progstat/5270_009.pdf) (last visited Feb. 27, 2017). If the charge against you is categorized as “low severity” or “moderate severity” and the BOP staff member in charge of your investigation thinks that he or she can informally come up with a solution to the incident with you, then the charge will be dropped and the incident will not be listed in your file. 28 C.F.R. § 541.5(b)(3) (2016).

242. 28 C.F.R. § 541.5(b) (2016).

243. 28 C.F.R. § 541.5(a) (2016).

244. 28 C.F.R. § 541.5(b)(1)(B) (2016).

245. 28 C.F.R. § 541.7(c) (2016).

246. 28 C.F.R. § 541.7(d) (2016).

247. 28 C.F.R. § 541.7(e) (2016).

248. 28 C.F.R. § 541.7(a) (2016).

249. *Luna v. Pico*, 356 F.3d 481, 487–88 (2d Cir. 2004) (citing *Superintendent v. Hill*, 472 U.S. 445, 454, 105 S. Ct.

Only the DHO can take away your good-time credits.<sup>251</sup> At least twenty-four hours before your hearing in front of the DHO, you will receive written notice of the charges against you.<sup>252</sup> If your case is referred to the DHO, you have the option of selecting a staff member to represent you at the DHO hearing.<sup>253</sup> The staff member cannot have been involved in the incident and cannot have investigated your incident report. If the staff member you select is unable or unwilling to represent you, you can request a different staff member. If several staff members cannot or will not represent you, however, then the Warden will appoint a staff member to be your representative if you want one or if you are not able to represent yourself (for example, if you cannot read and write).<sup>254</sup> You and your witnesses can present documents and make statements to prove that you did not break the rules.<sup>255</sup> Based on at least some facts and the weight of the evidence, the DHO will then decide whether or not you committed the prohibited act.<sup>256</sup>

After the DHO hearing, you will be given a copy of the DHO's decision, which will include: (1) whether you were advised of your rights during the DHO process; (2) the evidence relied on by the DHO; (3) the DHO's decision; (4) the sanction ("penalty") imposed by the DHO; and (5) the reason(s) for the sanction(s) imposed.<sup>257</sup>

When the DHO makes a decision on how much good-time credit to take away as punishment for your act, it will look at how bad your violation was and how often you committed the violation within a recent period of time.<sup>258</sup> There are four categories of offenses based on the seriousness of the violation: (1) Greatest Severity, (2) High Severity, (3) Moderate Severity, and (4) Low Severity.<sup>259</sup> The amount of good-time credits that you can lose increases with the level of your offense. The DHO can follow these guidelines, or can take away more or less credits based on aggravating (bad) or mitigating (good) factors in your case.<sup>260</sup>

If the offense you committed was on or after September 13, 1994 and before April 26, 1996, and you committed an offense that was labeled a "crime of violence" under the Violent Crime Control and Law Enforcement Act (VCCLEA) of 1994, then the amount of good-time credit you can lose in a disciplinary hearing is described below.<sup>261</sup>

For a Greatest Severity offense, the DHO must deduct at least forty-one days of credit, or if there is less than fifty-four days available for the prorated period, at least 75% of available good time for each act committed. For a High Severity offense, the DHO must deduct at least twenty-seven days of credit or at least 50% of the available good conduct time for each act committed if less than fifty-four days are in the period. For a Moderate Severity offense, the DHO does not have to deduct time unless you have been found to have committed two or more offenses at this level within the current year of your good conduct sentence credit availability, in which case the minimum deduction is fourteen days or 25% of the available good conduct time if less than fifty-four days are available for the period. For a Low Severity offense, the DHO does not have to deduct time unless you committed three or more Low Severity offenses during the current year of your good conduct credit availability, in which case the minimum deduction is seven days or 12.5% of available good time for a period less than fifty-four days.

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2768, 2773, 86 L. Ed. 2d 356, 364 (1985) (holding that at least some evidence is required before good conduct time credits can be taken away in a prison disciplinary hearing)).

250. 28 C.F.R. § 541.7(h) (2016); Fed. Bureau of Prisons, Program Statement 5270.09, at 17 (2011), *available at* [http://www.bop.gov/policy/progstat/5270\\_009.pdf](http://www.bop.gov/policy/progstat/5270_009.pdf) (last visited Feb. 27, 2017).

251. 28 C.F.R. § 541.8(g) (2016); 28 C.F.R. § 541.3, tbl. 1 (2016).

252. 28 C.F.R. § 541.8(c) (2016).

253. 28 C.F.R. § 541.8(d) (2016).

254. 28 C.F.R. § 541.8(d)(1) (2016).

255. 28 C.F.R. § 541.8(f) (2016). Please note, you may request that witnesses appear in person at your hearing to testify on your behalf. Such witnesses, however, may not appear if in the DHO's discretion, the witness is not reasonably available, their appearance at your hearing would threaten prison security, or if their testimony would be repetitive. 28 C.F.R. § 541.8(f)(3) (2016).

256. 28 C.F.R. § 541.8(f) (2016).

257. 28 C.F.R. § 541.8(h) (2016).

258. 28 C.F.R. § 541.3 (2016).

259. 28 C.F.R. § 541.3 (2016). See Table 1 for a list of offenses by category.

260. 28 C.F.R. § 541.13, tbl. 4(1)(b.1), (1)(b.1)(II) (2016).

261. *See* 28 C.F.R. § 541.4 (2016). Please note that other types of prisoners may be subject to this good time credit loss rule. Please make sure to read 28 C.F.R. § 541.4 to see if this rule applies to your sentence.

Type of Offense	Minimum Credits Deducted by DHO
Greatest Severity	Forty-one days of credit 75% of available good time for each act if less than fifty-four days are available
High Severity	Twenty-seven days of credit 50% of available good time for each act if less than fifty-four days are available
Moderate Severity	Only if you committed two or more offenses at this level within the current year of your good conduct sentence credit availability Fourteen days of credit 25% of available good time for each act if less than fifty-four days are available
Low Severity	Only if you committed three or more offenses at this level within the current year of your good conduct sentence credit availability Seven days of credit 12.5% of available good time for each act if less than fifty-four days are available

#### (d) Challenging the Loss of Good-Time Credits

You can challenge the loss of good-time credit. Under the Fourteenth Amendment's Due Process Clause, you have a protected liberty interest in your good-time credits.<sup>262</sup> The BOP must follow certain procedures in order to take your credits without violating your due process rights.<sup>263</sup> You should read *JLM*, Chapter 18, "Your Rights at Prison Disciplinary Proceedings," which explains your due process rights and how to raise defenses and challenges to your treatment at disciplinary hearings.

The proper way to bring a lawsuit to challenge the loss of good-time credits is through a petition for a writ of habeas corpus under 28 U.S.C. § 2241.<sup>264</sup> Before filing, you *must* read *JLM*, Chapter 13, "Federal Habeas Corpus," to learn how to file a federal habeas corpus petition. Before you can bring a lawsuit in court to challenge the loss of good-time credits, you *must* exhaust your administrative remedies<sup>265</sup> as required under the Prison Litigation Reform Act (PLRA). To avoid these consequences, you should also read *JLM*, Chapter 14, "The Prison Litigation Reform Act," to learn about PLRA requirements.

This Section includes only a brief description of the federal administrative remedy procedures you will need to follow to challenge the loss of your good-time credits. You have twenty calendar days from the date of the DHO decision to appeal it.<sup>266</sup> Your appeal should be sent directly to the Regional Director for your region within twenty days of the decision to take away your good time credits.<sup>267</sup> You should include a separate completed, signed, and dated form BP-10 for each incident that is being appealed along with a copy of the DHO report.<sup>268</sup> The form can be obtained from the staff at Community Corrections Centers or from

262. *Henson v. U.S. Bureau of Prisons*, 213 F.3d 897, 898 (5th Cir. 2000) (recognizing federal prisoner's due process right to a hearing before removal of good-time credits, but noting not all the rights due in a criminal trial apply).

263. *Wolff v. McDonnell*, 418 U.S. 539, 556, 557, 94 S. Ct. 2963, 2975, 41 L. Ed. 2d 935, 951 (1974). For a full discussion of this case and these issues, see *JLM*, Chapter 18, "Your Rights at Prison Disciplinary Hearings."

264. *Thomas v. Marberry*, No. 06-CV-13282, 2007 U.S. Dist. LEXIS 25408, at \*5 (E.D. Mich. Apr. 5, 2007) (holding that a habeas corpus petition is a proper means of challenging the loss of good-time credits in a disciplinary proceeding because it affects the way in which the sentence is being executed); *see also* *Edwards v. Clarke*, No. C07-5057RJB, 2007 U.S. Dist. LEXIS 24271, at \*3 (W.D. Wash. Apr. 2, 2007) (dismissing a federal prisoner's 42 U.S.C. § 1983 claim to recover his lost good conduct time credits because such a claim is challenging the length of confinement and finding that the correct claim for relief is a habeas corpus petition (citing *Edwards v. Baslisok*, 520 U.S. 641, 117 S. Ct. 1584, 137 L. Ed. 2d 906 (1997))).

265. "Administrative remedies" are the internal procedures used within the BOP system to resolve your complaint. A federal court will not accept your case unless you have "exhausted" (used up) all the appeals and procedures within the BOP system. See *JLM*, Chapter 13, "Federal Habeas Corpus," for more information.

266. Fed. Bureau of Prisons, Program Statement 1330.17, at 6-7 (2012), available at [http://www.bop.gov/policy/progstat/1330\\_017.pdf](http://www.bop.gov/policy/progstat/1330_017.pdf) (last visited Feb. 27, 2017).

267. Fed. Bureau of Prisons, Program Statement 1330.17, at 6-7 (2012), available at [http://www.bop.gov/policy/progstat/1330\\_017.pdf](http://www.bop.gov/policy/progstat/1330_017.pdf) (last visited Feb. 27, 2017).

268. Fed. Bureau of Prisons, Program Statement 1330.17, at 6-7 (2012), available at [http://www.bop.gov/policy/progstat/1330\\_017.pdf](http://www.bop.gov/policy/progstat/1330_017.pdf) (last visited Feb. 27, 2017).

institution staff, usually the correctional counselor.<sup>269</sup> If you cannot get a copy of the DHO report, include the date of your hearing and the charges brought against you.<sup>270</sup> The Regional Director should respond to your appeal within thirty days of receiving it.<sup>271</sup>

If the Regional Director does not remove the charges against you, the final administrative appeal step is to send an appeal to the General Counsel of the Community Corrections Center Central Office within thirty days of receiving the Regional Director's response.<sup>272</sup> Your appeal to the General Counsel should include a completed, signed, and dated form BP-11, which can be obtained from the same staff member, a copy of the DHO report, a copy of your appeal to the Regional Director, and a copy of the Regional Director's response, along with the reason that you are appealing.<sup>273</sup> The General Counsel should provide you with a response to your appeal within forty days of receiving it.<sup>274</sup>

## 2. Early Release under the Residential Drug Abuse Program

In addition to good-time credits, you can also shorten your federal sentence through participation in a Residential Drug Abuse Program (RDAP). You must meet certain conditions to participate in a RDAP. You must also meet additional requirements to be eligible for early release upon completing a RDAP. If at any stage of application, admission, removal, or denial of early release status you do not agree with the decision in your case, you can appeal by using the same procedures described in the good conduct time section above.<sup>275</sup> Just like good conduct time, you must exhaust your administrative remedies before you can bring a lawsuit to challenge the BOP's decision.

### (a) What is RDAP?

The Residential Drug Abuse Program ("RDAP") is a federal program offered in some federal facilities<sup>276</sup> for prisoners with substance abuse problems. In RDAP, you participate in individual and group activities to learn to overcome your substance abuse problems.<sup>277</sup> RDAP is a 500-hour program that takes place over nine to twelve months in a separate housing facility for RDAP participants.<sup>278</sup>

### (b) How do You Get into RDAP?

Entry into RDAP is voluntary, and is determined by the drug abuse treatment coordinator through staff referrals and/or prisoner applications. If you want admission to an RDAP, you can receive a referral from, or make a request to, a staff member in your housing unit or on the drug treatment team.<sup>279</sup> If you request admission into an RDAP, the BOP will decide whether you are eligible to participate in the residential portion.

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269. Fed. Bureau of Prisons, Program Statement 1330.13, at 5 (2012), *available at* [http://www.bop.gov/policy/progstat/1330\\_017.pdf](http://www.bop.gov/policy/progstat/1330_017.pdf) (last visited Feb 27, 2017).

270. 28 C.F.R. § 541.19 (2016).

271. Fed. Bureau of Prisons, Program Statement 1330.17, at 9 (2012), *available at* [http://www.bop.gov/policy/progstat/1330\\_017.pdf](http://www.bop.gov/policy/progstat/1330_017.pdf) (last visited Feb 27, 2017).

272. Fed. Bureau of Prisons, Program Statement 1330.17, at 6–7 (2012), *available at* [http://www.bop.gov/policy/progstat/1330\\_017.pdf](http://www.bop.gov/policy/progstat/1330_017.pdf) (last visited Feb 27, 2017).

273. Fed. Bureau of Prisons, Program Statement 1330.17, at 6–7 (2012), *available at* [http://www.bop.gov/policy/progstat/1330\\_017.pdf](http://www.bop.gov/policy/progstat/1330_017.pdf) (last visited Feb 27, 2017).

274. Fed. Bureau of Prisons, Program Statement 1330.17, at 6–7 (2012), *available at* [http://www.bop.gov/policy/progstat/1330\\_017.pdf](http://www.bop.gov/policy/progstat/1330_017.pdf) (last visited Feb 27, 2017).

275. 28 C.F.R. § 550.57 (2016).

276. Fed. Bureau of Prisons, Residential Drug Treatment Program Locations (2015), *available at* [http://www.bop.gov/inmates/custody\\_and\\_care/docs/RDAP\\_locations.pdf](http://www.bop.gov/inmates/custody_and_care/docs/RDAP_locations.pdf) (last visited Feb. 27, 2017).

277. Fed. Bureau of Prisons, Substance Abuse Treatment, *available at* [http://www.bop.gov/inmates/custody\\_and\\_care/substance\\_abuse\\_treatment.jsp](http://www.bop.gov/inmates/custody_and_care/substance_abuse_treatment.jsp) (last visited Feb. 27, 2017).

278. 18 U.S.C. § 3621(e)(5)(a) (2012); Fed. Bureau of Prisons, Program Statement 5330.11, at 8–10 (2009), *available at* [http://www.bop.gov/policy/progstat/5330\\_011.pdf](http://www.bop.gov/policy/progstat/5330_011.pdf) (last visited Feb. 27, 2017).

279. 28 C.F.R. §§ 550.53(c)–(d) (2016).

## (c) Who is Eligible to Participate in RDAP?

Before you can participate in RDAP, the BOP must decide that you have a substance abuse problem, and you must be willing to participate in a residential substance abuse treatment program.<sup>280</sup> To be eligible, you must also sign an agreement form stating that you understand your responsibilities in joining the RDAP.<sup>281</sup> Some of your responsibilities include not disrupting the staff, other group members, or activities of RDAP; completing all RDAP activities, including homework and group assignments; and, not sharing information about other prisoners in the program. To be admitted to RDAP, your security level needs to be within the range that can be handled at the RDAP facility. In general, you can only be admitted to RDAP when you are thirty-six months from your release date. Prisoners with serious mental impairments that would not allow them to fully participate in the program will not be allowed into RDAP.

If you have a physical or medical disability that prevents you from living in an RDAP housing unit, you may still be eligible for early release if you meet all of the eligibility requirements for RDAP and have completed all of the program components of RDAP, including community-based treatment.

Even if you cannot participate in RDAP, there are other substance abuse programs you may be able to join. These programs do not, however, have the same early release benefits as RDAP. These other programs include drug abuse education classes<sup>282</sup> and non-residential drug abuse treatment.<sup>283</sup> Community transitional drug treatment is available for prisoners with mental illnesses and sex offenders. Community treatment is also available for some prisoners who remain in a Residential Reentry Center and have gotten an incident report related to substance abuse and who are dealing with issues like grief, loss, depression, adjustment issues, or anxiety.<sup>284</sup>

## (d) Who May be Eligible for Early Release under RDAP?

To be eligible for early release under RDAP you must meet all four of the following requirements:

- (1) You were convicted and sentenced for either:
  - a. a federal offense that occurred on or after November 1, 1987,<sup>285</sup> or
  - b. a Washington D.C. offense on or after August 5, 2000;<sup>286</sup>
- (2) You were sentenced for committing a non-violent offense;<sup>287</sup>
- (3) The BOP categorizes you as having a “diagnosis for a substance use disorder”;<sup>288</sup>
- (4) You successfully completed all stages of a RDAP.<sup>289</sup>

The second requirement prevents you from receiving early release under RDAP if you were sentenced for committing a violent offense.<sup>290</sup> The BOP can look at both the actual crime for which you were sentenced as

280. 18 U.S.C. § 3621(e)(5)(B)(i) and (ii) (2012).

281. 28 C.F.R. § 550.53(b)(2) (2016).

282. 28 C.F.R. § 550.51 (2016).

283. 28 C.F.R. § 550.52 (2016).

284. See 28 C.F.R. § 550.56 (2016); Substance Abuse Treatment, Bureau of Prisons, [http://www.bop.gov/inmates/custody\\_and\\_care/substance\\_abuse\\_treatment.jsp?](http://www.bop.gov/inmates/custody_and_care/substance_abuse_treatment.jsp?) (last visited Oct. 4, 2015).

285. Fed. Bureau of Prisons, *Early Release Procedures Under 18 U.S.C. § 3621(e)*, 550.55(a)(1)(i) (2009), available at [http://www.bop.gov/policy/progstat/5331\\_002.pdf](http://www.bop.gov/policy/progstat/5331_002.pdf) (last visited Feb. 27, 2017).

286. Fed. Bureau of Prisons, *Early Release Procedures Under 18 U.S.C. § 3621(e)*, 5331.02(4)(a)(2)(ii) (2009), available at [http://www.bop.gov/policy/progstat/5331\\_002.pdf](http://www.bop.gov/policy/progstat/5331_002.pdf) (last visited Feb. 27, 2017).

287. Fed. Bureau of Prisons, *Early Release Procedures Under 18 U.S.C. § 3621(e)*, 5331.02(4)(a)(2)(i)–(ii) (2009), available at [http://www.bop.gov/policy/progstat/5331\\_002.pdf](http://www.bop.gov/policy/progstat/5331_002.pdf) (last visited Feb. 27, 2017).

288. Fed. Bureau of Prisons, *Early Release Procedures Under 18 U.S.C. § 3621(e)*, 5331.02(4)(a)(1) (2009), available at [http://www.bop.gov/policy/progstat/5331\\_002.pdf](http://www.bop.gov/policy/progstat/5331_002.pdf) (last visited Feb. 27, 2017).

289. Fed. Bureau of Prisons, *Early Release Procedures Under 18 U.S.C. § 3621(e)*, 5331.02(4)(a)(3) (2009), available at [http://www.bop.gov/policy/progstat/5331\\_002.pdf](http://www.bop.gov/policy/progstat/5331_002.pdf) (last visited Feb. 27, 2017). If you already completed a RDAP before October 1, 1989, you may still be eligible for early release under 18 U.S.C. § 3621(e). In order to be eligible, BOP staff must determine that the program you completed met all of the current RDAP treatment criteria, you must sign an agreement that you understand your program responsibilities, complete a refresher course and transitional treatment in a community-based program, and you must not commit a prohibited 100 level act or act involving drugs or alcohol.

290. Fed. Bureau of Prisons, *Categorization of Offenses* 5162.05, (2009) at 3–8, available at [http://www.bop.gov/policy/progstat/5162\\_005.pdf](http://www.bop.gov/policy/progstat/5162_005.pdf) (last visited Oct. 4, 2015) (listing offenses that are considered violent and will prevent you from participating in RDAP).

well as the circumstances surrounding that crime. You can also be ineligible if you committed other offenses identified at the Director's discretion.<sup>291</sup> These include: a felony that had actual or threatened physical force against a person or someone else's property as an element or that would likely involve the use of force against a person or property; a crime involving a firearm, explosive or other dangerous weapon; a crime involving sexual abuse of children; a crime with an enhanced base offense level because of the threat of or use of force; or a crime with a specific offense enhancement for threat of or use of force.<sup>292</sup>

To meet the third requirement, a drug abuse coordinator must find that you have a "drug use disorder," which is a "substance abuse or dependence," as defined in the American Psychiatric Association's Diagnostic and Statistical Manual (DSM). Any written documentation in your Pre-Sentence Investigation (PSI) report or central file showing that you previously used the same substance can also be used to verify your substance abuse problem.<sup>293</sup> Specifically, the BOP will consider the following when deciding whether you have a substance abuse problem:

- (1) Documentation that shows that you had a substance abuse problem within one year of your arrest on the offense for which you are now serving;
- (2) Documentation by a probation officer, parole office, social services worker, etc. that you had a substance abuse problem within one year of your arrest on the offense for which you are now serving;
- (3) Documentation by a substance abuse counselor, doctor, or substance abuse treatment provider who diagnosed and treated you within one year of your arrest on the offense for which you are now serving;
- (4) Multiple (two or more) convictions for Driving Under the Influence (DUI) or Driving While Intoxicated (DWI) in the 5 years prior to your arrest on the offense for which you are now serving.<sup>294</sup>

You also may be classified as having a drug abuse problem during your participation in a drug abuse education course or non-residential drug abuse treatment after testing positive during a urine test.

The fourth requirement is that you successfully complete all stages of RDAP. RDAP has three stages, each of which you must finish before you can be considered for early release. The first stage of RDAP is the unit-based program that ordinarily takes no longer than nine months.<sup>295</sup> The unit-based program has three phases: orientation, core treatment, and transition. To complete the unit-based program, you must attend and participate in group activities and pass a test given at the end of each subject covered in treatment.<sup>296</sup> If you do not pass a test for any given subject, you will typically be allowed to take the test only one more time.<sup>297</sup>

The second stage of RDAP is follow-up services. If there is time between the completion of your unit-based program and your transfer to a community based program, you must participate in follow-up treatment services.<sup>298</sup> You will enter follow-up treatment within one month after returning to general population. You must remain in follow-up services for at least twelve months or until you undergo

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291. Fed. Bureau of Prisons, *Categorization of Offenses* 5162.05, at 8–15 (2009), available at [http://www.bop.gov/policy/progstat/5162\\_005.pdf](http://www.bop.gov/policy/progstat/5162_005.pdf) (last visited Oct. 4, 2015). In *Lopez v. Davis*, the Supreme Court held reasonable the Bureau of Prisons's regulations making certain prisoners automatically ineligible for early release under 18 U.S.C. § 3621(e) if there was a firearm involved in their offense, even where the underlying was categorized as a non-violent offense. *Lopez v. Davis*, 531 U.S. 230, 244, 121 S. Ct. 714, 724, 148 L. Ed. 2d 635, 648 (2001).

292. Fed. Bureau of Prisons, *Categorization of Offenses* 5162.05, at 8 (2009), available at [http://www.bop.gov/policy/progstat/5162\\_005.pdf](http://www.bop.gov/policy/progstat/5162_005.pdf) (last visited Feb. 27, 2017) (listing offenses that are included in this category and offenses that may create ineligibility for RDAP at the Director's discretion).

293. Fed. Bureau of Prisons, *Psychology Treatment Programs*, 5330.11, 11–12 (2009), available at [http://www.bop.gov/policy/progstat/5330\\_011.pdf](http://www.bop.gov/policy/progstat/5330_011.pdf) (last visited Feb. 27, 2017).

294. Fed. Bureau of Prisons, *Psychology Treatment Programs* 5330.11, 12 (2009), available at [http://www.bop.gov/policy/progstat/5330\\_011.pdf](http://www.bop.gov/policy/progstat/5330_011.pdf) (last visited Feb. 27, 2017).

295. Fed. Bureau of Prisons, *Psychology Treatment Programs* 5330.11, 16 (2009), available at [http://www.bop.gov/policy/progstat/5330\\_011.pdf](http://www.bop.gov/policy/progstat/5330_011.pdf) (last visited Feb. 27, 2017).

296. Fed. Bureau of Prisons, *Psychology Treatment Programs* 5330.11, 16 (2009), available at [http://www.bop.gov/policy/progstat/5330\\_011.pdf](http://www.bop.gov/policy/progstat/5330_011.pdf) (last visited Feb. 27, 2017).

297. Fed. Bureau of Prisons, *Psychology Treatment Programs* 5330.11, 16 (2009), available at [http://www.bop.gov/policy/progstat/5330\\_011.pdf](http://www.bop.gov/policy/progstat/5330_011.pdf) (last visited Feb. 27, 2017).

298. 28 C.F.R. § 550.53(a)(2) (2016); Fed. Bureau of Prisons, *Psychology Treatment Programs* 5330.11, at 8, 22 (2009), available at [http://www.bop.gov/policy/progstat/5330\\_011.pdf](http://www.bop.gov/policy/progstat/5330_011.pdf) (last visited Feb. 27, 2017).

transitional drug abuse treatment (“TDAT”).<sup>299</sup> Follow-up services consist of twelve monthly group sessions of at least one hour.<sup>300</sup>

The final stage of RDAP is TDAT. After completing follow-up services, you will be transferred to community confinement where you must participate in treatment for at least one hour per month.<sup>301</sup>

Certain people are not allowed to get early release through RDAP under *any* circumstances. You cannot receive early release under RDAP if you:

- (1) are a pre-trial or immigration detainee;
- (2) are in federal prison for committing a state or military crime;
- (3) are not eligible for participation in community-treatment programs as determined by the Warden at your facility;
- (4) have a past conviction for homicide, forcible rape, robbery, aggravated assault, or child sexual abuse offenses;
- (5) are currently incarcerated for committing a felony that had as an element, or given the crime committed, would likely involve the use of actual or threatened physical force against a person or someone else’s property, or that involved a firearm, explosive or other dangerous weapon, or that involved sexual abuse of children;<sup>302</sup> or
- (6) were previously released on RDAP early release.<sup>303</sup>

#### (e) How Might RDAP Affect Your Sentence?

If you meet the requirements for RDAP early release, the BOP can reduce your prison sentence by up to one year, in addition to any good conduct time credit reductions you have received.<sup>304</sup> Your case will be reviewed several times to determine whether you remain eligible for early release under RDAP.<sup>305</sup> While the BOP has the ability to reduce your sentence after you successfully complete RDAP, the BOP is not required to do so.<sup>306</sup> If at any time you commit a prohibited act, fail to complete all RDAP requirements, or the BOP discovers it made an error in determining your eligibility, the BOP can remove RDAP early release status.<sup>307</sup> The denial of early release after you successfully complete RDAP does not violate any contractual rights guaranteeing your release or the Constitution’s *Ex Post Facto* Clause.<sup>308</sup> You can appeal your denial of early release<sup>309</sup> under RDAP using the same procedures explained in the loss of good-time credit section.<sup>310</sup>

299. Fed. Bureau of Prisons, *Psychology Treatment Programs* 5330.11, 22 (2009), available at [http://www.bop.gov/policy/progstat/5330\\_011.pdf](http://www.bop.gov/policy/progstat/5330_011.pdf) (last visited Feb. 27, 2017).

300. Fed. Bureau of Prisons, *Psychology Treatment Programs* 5330.11, 22 (2009), available at [http://www.bop.gov/policy/progstat/5330\\_011.pdf](http://www.bop.gov/policy/progstat/5330_011.pdf) (last visited Feb. 27, 2017).

301. 28 C.F.R. § 550.56 (2016); Fed. Bureau of Prisons, *Psychology Treatment Programs* 5330.11, 8 (2009), available at [http://www.bop.gov/policy/progstat/5330\\_011.pdf](http://www.bop.gov/policy/progstat/5330_011.pdf) (last visited Feb. 27, 2017).

302. 28 C.F.R. § 550.55(b) (2016).

303. 28 C.F.R. § 550.55(b) (2016).

304. 18 U.S.C. § 3621(e)(2)(B) (2016).

305. See Fed. Bureau of Prisons, *Early Release Procedures Under 18 U.S.C. § 3621(e)* 5331.02(7) (2009), available at [http://www.bop.gov/policy/progstat/5331\\_002.pdf](http://www.bop.gov/policy/progstat/5331_002.pdf) (last visited Feb. 27, 2017). Your early release can be delayed or reduced if the Regional Drug Abuse Treatment Coordinator certifies that you have not successfully completed your treatment. Fed. Bureau of Prisons, Program Statement 7430.02(15)(f), at 15 (1999), available at [http://www.bop.gov/policy/progstat/7430\\_002.pdf](http://www.bop.gov/policy/progstat/7430_002.pdf) (last visited Feb. 27, 2017).

306. *Richardson v. Joslin*, 501 F.3d 415, 420 (5th Cir. 2007) (finding that defendant had no liberty interest in a reduction of his sentence after he successfully completed RDAP since BOP has “the authority, but not the duty” to reduce a term of imprisonment); see *Lopez v. Davis*, 531 U.S. 230, 241, 121 S. Ct. 714, 722, 148 L. Ed. 2d 635, 646–48 (2001) (finding that the BOP has the discretion to exclude prisoners based on conduct from before their conviction).

307. Fed. Bureau of Prisons, *Early Release Procedures Under 18 U.S.C. § 3621(e)*, 5331.02(7) (2009), available at [http://www.bop.gov/policy/progstat/5331\\_002.pdf](http://www.bop.gov/policy/progstat/5331_002.pdf) (last visited Oct. 4, 2015).

308. *Seacrest v. Gallegos*, No. 01-1289, 30 Fed. App’x 755, 766, 2002 U.S. App. LEXIS 1094, at \*\*4 (10th Cir. Jan. 25, 2002) (*unpublished*) (finding the BOP’s decision to change prisoner’s status from eligible to ineligible for early release consideration did not violate the *Ex Post Facto* Clause, since the decision did not affect the legal definition of the crime or increase the prisoner’s punishment, and no contractual relationship existed between the prisoner and the BOP).

309. *Royal v. Tombone*, 141 F.3d 596, 603–04 (5th Cir. 1998).

310. 28 C.F.R. § 550.57 (2016); *Fristoe v. Thompson*, 144 F.3d 627, 630 (10th Cir. 1998) (finding that there is no *Ex Post Facto* violation because the legal consequences and the sentence of the prisoner’s crime remained the same after

### (f) How Can Your Participation in RDAP End?

Your participation in RDAP can end if you choose to voluntarily end your participation in RDAP, fail to pass your subject tests, or are removed from RDAP by the BOP.<sup>311</sup> Once you are no longer in RDAP, you lose your early release eligibility and return to your previous housing unit or facility. The drug treatment coordinator may remove you from the program for disruptive behavior. If you are in the RDAP program you must be given one formal warning before you are removed from the program, unless your actions are considered so disruptive that you would create a problem for RDAP staff and other prisoners in the program.<sup>312</sup> Also, if you do not follow all of the rules and regulations of RDAP you will be expelled from the program.<sup>313</sup>

Your participation in RDAP may also be terminated immediately if an incident report<sup>314</sup> is filed and the DHO finds you (1) used or possessed alcohol or drugs; (2) were violent or threatened violence against staff or another prisoner; or (3) committed a 100 level<sup>315</sup> prohibited act.<sup>316</sup> You may also be terminated immediately from the RDAP program for violating confidentiality (telling other persons information that RDAP staff have told you is not allowed to be shared with other persons).<sup>317</sup>

If the warden or the drug abuse treatment program coordinator removes you from RDAP, you may request readmission by submitting an “Inmate to Staff Form” ninety days after your removal from the program.<sup>318</sup> The drug abuse treatment program coordinator will decide whether to readmit you to the program. Even if you are readmitted to RDAP, you will not receive credit for the parts of the program you completed before you were removed from the program.<sup>319</sup>

### 3. Early Release Under the Second Chance Act

The Second Chance Act of 2007 is a federal law designed to improve the system for releasing federal prisoners.<sup>320</sup> This Act authorizes the BOP to grant early release to prisoners who meet the following three conditions:<sup>321</sup>

- (1) Are over the age of sixty-five;
- (2) Have never been convicted of a violent crime or sex offense; and
- (3) Have served ten years or 75% of their sentence.

Very few prisoners will be eligible for early release under this program. The Bureau of Prison recently estimated that only about 650 federal inmates (or 0.003% of all federal inmates) will meet the requirements.<sup>322</sup> The BOP began a pilot program, however, to test this new early release system. The program began in October 1, 2008. If you think you are eligible for early release under this program, you should ask your warden whether your prison or jail is participating.

the change); *Stiver v. Meko*, 130 F.3d 574, 578 (3d Cir. 1997) (finding that there was no Ex Post Facto violation because the legal consequences of the prisoner’s crime were the same).

311. Fed. Bureau of Prisons, *Psychology Treatment Programs* 5330.11, 16–17 (2009), available at [http://www.bop.gov/policy/progstat/5330\\_011.pdf](http://www.bop.gov/policy/progstat/5330_011.pdf) (last visited Feb. 27, 2017).

312. Fed. Bureau of Prisons, *Psychology Treatment Programs* 5330.11, 17–18 (2009), available at [http://www.bop.gov/policy/progstat/5330\\_011.pdf](http://www.bop.gov/policy/progstat/5330_011.pdf) (last visited Feb. 27, 2017).

313. Fed. Bureau of Prisons, *Psychology Treatment Programs* 5330.11, 17–19 (2009), available at [http://www.bop.gov/policy/progstat/5330\\_011.pdf](http://www.bop.gov/policy/progstat/5330_011.pdf) (last visited Feb. 27, 2017).

314. See Part M(1)(c) for more information on incident reports and related hearings.

315. See 28 C.F.R. § 541.3 (2016) for a complete list of 100 level prohibited acts.

316. Fed. Bureau of Prisons, *Psychology Treatment Programs* 5330.11, 17–19 (2009), available at [http://www.bop.gov/policy/progstat/5330\\_011.pdf](http://www.bop.gov/policy/progstat/5330_011.pdf) (last visited Feb. 27, 2017).

317. Fed. Bureau of Prisons, *Psychology Treatment Programs* 5330.11, 19 (2009), available at [http://www.bop.gov/policy/progstat/5330\\_011.pdf](http://www.bop.gov/policy/progstat/5330_011.pdf) (last visited Feb. 27, 2017).

318. Fed. Bureau of Prisons, No. P5330.11, *Psychology Treatment Programs* 19 (2009), available at [http://www.bop.gov/policy/progstat/5330\\_011.pdf](http://www.bop.gov/policy/progstat/5330_011.pdf) (last visited Feb. 27, 2017).

319. Fed. Bureau of Prisons, No. P5330.11, *Psychology Treatment Programs* 19 (2009), available at [http://www.bop.gov/policy/progstat/5330\\_011.pdf](http://www.bop.gov/policy/progstat/5330_011.pdf) (last visited Feb. 27, 2017).

320. 42 U.S.C. § 17541 (2014).

321. 42 U.S.C. § 17541(g)(5)(A) (2014).

322. Douglas A. Berman, Another Report from the USSC Alternatives Symposium (July 24, 2008), [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2008/07/another-report.html](http://sentencing.typepad.com/sentencing_law_and_policy/2008/07/another-report.html) (last visited Feb. 27, 2017).

#### 4. Federal Compassionate Release

Compassionate release is given very rarely. Compassionate release allows the Director of the BOP to recommend that your sentence be reduced to remove you immediately from prison. There are four situations in which compassionate relief might be granted:

- (1) upon motion by the BOP Director for “extraordinary and compelling” reasons<sup>323</sup> that develop after the time of sentencing;
- (2) upon motion by the BOP Director for people who are seventy years of age or older, who have served at least thirty years of their sentence, and are determined not to be threats to society;<sup>324</sup>
- (3) to modify a sentence under Rule 35 of the Federal Rules of Criminal Procedure (to correct a clear error within seven days of the sentence or for providing substantial assistance to the government to investigate or prosecute someone else);<sup>325</sup> or
- (4) if a sentence was given based on a sentencing range that has since been lowered.<sup>326</sup>

This Section deals only with the first category: extraordinary or compelling reasons.

##### (a) What are “Extraordinary and Compelling” Reasons?

There are no formal definitions for “extraordinary and compelling” reasons. The U.S. Sentencing Commission, however, provides four examples of what could be considered extraordinary and compelling reasons that might justify compassionate relief:<sup>327</sup>

- (1) You have a terminal illness or an illness that prevents you from caring for yourself;<sup>328</sup>
- (2) Your only family member who can care for your minor child or children is no longer able to do so due to death or incapacitation;<sup>329</sup>
- (3) You have a permanent physical or medical condition, or worsening physical or mental health from getting older, and your medical condition does not allow you to properly care for yourself in prison and your condition is unlikely to improve through treatment;<sup>330</sup> or
- (4) The BOP Director has found another reason you should be granted compassionate release, or the BOP Director has found you qualify because of a combination of reasons (1), (2), and (3).<sup>331</sup>

In addition to each of these reasons, you also must not be a danger to society or be able to commit a further crime.<sup>332</sup>

##### (b) How Can You Apply for Compassionate Release?

It is important to know that you cannot make a motion directly to a court to reduce your sentence for compassionate release. If you file a motion yourself, the court will not reduce your sentence. The only way to obtain compassionate release from the court is through a motion made by the Director of the BOP.<sup>333</sup>

323. See 18 U.S.C. § 3582(c)(1)(A)(i) (2012) for offenses that happened on or after November 1, 1987. This section does not discuss the rules for offenses that occurred before November 1, 1987, which are governed by 18 U.S.C. § 4205(g). Although 18 U.S.C. § 4205 expired on November 1, 2013, the Bureau of Prisons issued guidelines stating that it “remains the controlling law for inmates whose offenses occurred prior to that date.” Fed. Bureau of Prisons, No. 5050.49, Compassionate Release /Reduction in Sentence 2 (2013), *available at* [http://www.bop.gov/policy/progstat/5050\\_049\\_CN-1.pdf](http://www.bop.gov/policy/progstat/5050_049_CN-1.pdf) (last visited Feb. 27, 2017).

324. 18 U.S.C. § 3582(c)(1)(A)(ii) (2015).

325. 18 U.S.C. § 3582(c)(1)(B) (2015).

326. 18 U.S.C. § 3582(c)(2) (2015).

327. 28 U.S.C. § 994(t) (2015) (stating that the Sentencing Commission has power to describe what should be considered extraordinary and compelling reasons for reducing a prisoner’s sentence).

328. 18 U.S.C. App’x § 1B1.13, Application Note 1(A)(i) (2007).

329. 18 U.S.C. App’x § 1B1.13, Application Note 1(A)(iii) (2007).

330. 18 U.S.C. App’x § 1B1.13, Application Note 1(A)(ii) (2007).

331. 18 U.S.C. App’x § 1B1.13, Application Note 1(A)(iv) (2007).

332. *See* *Leja v. Sabol*, 487 F. Supp. 2d 1, 3 (D. Mass. 2007) (holding that the BOP’s decision to deny release was not arbitrary or capricious because defendant’s illness was not terminal and defendant was still able to commit crimes).

333. *See* *United States v. Smartt*, 129 F.3d 539, 541 (10th Cir. 1997) (finding that even though the defendant had a medical condition that could be considered an extraordinary and compelling circumstance, the court could not approve his motion because the request was not made by the BOP Director); *see also* *United States v. Tyler*, 417 F. Supp.2d 80, 84 (D. Me. 2006) (denying relief because no motion was made by the BOP Director).

To receive this, you must first submit a motion to your warden, asking for compassionate release. The request should be in writing. In the motion you must describe the extraordinary or compelling circumstances that did not exist when you were sentenced.<sup>334</sup> You must also describe your plan for release, including where you will live, how you will support yourself, and, if your reason is based on your health, where you will get medical care and how you will pay for it.<sup>335</sup>

If your reason for compassionate release is based on a medical condition, make sure to state that information at the beginning of your motion so that your request can be reviewed more quickly.

If the warden thinks your motion should be granted, he will send it to the Regional Director of the BOP.<sup>336</sup> The Regional Director will then review your motion, and if he thinks your motion should be granted, he will send it to the BOP's Office of General Counsel.<sup>337</sup> The General Counsel will then review your motion, and if he decides that you should be given compassionate release, he will ask for an opinion from the Medical Director (if your reason is health-related), or the Assistant Director of the Correctional Programs Division (for all other reasons).<sup>338</sup> Finally, the recommendation of the General Counsel, along with the opinion from the Medical or Assistant Director, will be sent to the Director of the BOP to make a final decision on your motion.<sup>339</sup>

If the Director approves your request, he will contact the U.S. Attorney. The U.S. Attorney will then make a motion to the court to have your sentence reduced.<sup>340</sup> The sentencing court will review the Director's motion and decide whether there are extraordinary and compelling reasons to justify your release. If the sentencing court grants the motion, it will order your release. The warden at your facility will then release you.<sup>341</sup>

### (c) Denial

Any of the officials described above may deny your motion. The official who denies your motion will send you written notice stating that your request has been denied and explaining why it was denied. If your request for compassionate relief is denied by the warden or the Regional Director, you can appeal the decision.<sup>342</sup> If you are denied by the General Counsel or the BOP Director, however, that decision is a *final* administrative decision and cannot be appealed.<sup>343</sup>

In order to challenge the BOP's decision, you must first go through all of the administrative remedies, as required by the Prison Litigation Reform Act.<sup>344</sup> Even if you are sick or believe that the BOP will not approve your motion on appeal, you must still exhaust all levels of the administrative remedy process. Only after you do this can you file a petition for writ of habeas corpus, which asks the court to reverse the warden's decision.<sup>345</sup> It is important to point out, however, that it is very unlikely that the court will grant

334. Fed. Bureau of Prisons, Program Statement 5050.49(2)(a) (2013), [https://www.bop.gov/policy/progstat/5050\\_049\\_CN-1.pdf](https://www.bop.gov/policy/progstat/5050_049_CN-1.pdf) (last visited Feb. 27, 2017); 28 C.F.R. § 571.61 (2016).

335. Fed. Bureau of Prisons, Program Statement 5050.49(2)(a), (2013), [https://www.bop.gov/policy/progstat/5050\\_049\\_CN-1.pdf](https://www.bop.gov/policy/progstat/5050_049_CN-1.pdf) (last visited Feb. 27, 2017); 28 C.F.R. § 571.61 (2016).

336. Fed. Bureau of Prisons, Program Statement 5050.49(8)(a), (2013), [https://www.bop.gov/policy/progstat/5050\\_049\\_CN-1.pdf](https://www.bop.gov/policy/progstat/5050_049_CN-1.pdf) (last visited Feb. 27, 2017); 28 C.F.R. § 571.62(a)(1) (2016).

337. Fed. Bureau of Prisons, Program Statement 5050.49(8)(a), (2013), [https://www.bop.gov/policy/progstat/5050\\_049\\_CN-1.pdf](https://www.bop.gov/policy/progstat/5050_049_CN-1.pdf) (last visited Feb. 27, 2017); 28 C.F.R. § 571.62(a)(1) (2016).

338. Fed. Bureau of Prisons, Program Statement 5050.49(8)(a)(2), (2013), [https://www.bop.gov/policy/progstat/5050\\_049\\_CN-1.pdf](https://www.bop.gov/policy/progstat/5050_049_CN-1.pdf) (last visited Feb. 27, 2017); 28 C.F.R. § 571.62(a)(3) (2016).

339. Fed. Bureau of Prisons, Program Statement 5050.49(8)(a)(2), (2013), [https://www.bop.gov/policy/progstat/5050\\_049\\_CN-1.pdf](https://www.bop.gov/policy/progstat/5050_049_CN-1.pdf) (last visited Feb. 27, 2017); 28 C.F.R. § 571.62(a)(3) (2016).

340. Fed. Bureau of Prisons, Program Statement 5050.49(8)(a)(3), (2013), [https://www.bop.gov/policy/progstat/5050\\_049\\_CN-1.pdf](https://www.bop.gov/policy/progstat/5050_049_CN-1.pdf) (last visited Feb. 27, 2017); 28 C.F.R. § 571.62(a)(3) (2016).

341. Fed. Bureau of Prisons, Program Statement 5050.49(8)(b), (2013), [https://www.bop.gov/policy/progstat/5050\\_049\\_CN-1.pdf](https://www.bop.gov/policy/progstat/5050_049_CN-1.pdf) (last visited Feb. 27, 2017); 28 C.F.R. § 571.62(b) (2016).

342. Fed. Bureau of Prisons, Program Statement 5050.49(9)(a), (2013), [https://www.bop.gov/policy/progstat/5050\\_049\\_CN-1.pdf](https://www.bop.gov/policy/progstat/5050_049_CN-1.pdf) (last visited Feb. 27, 2017); 28 C.F.R. § 571.63(a) (2016).

343. Fed. Bureau of Prisons, Program Statement 5050.49(9)(d), (2013), [https://www.bop.gov/policy/progstat/5050\\_049\\_CN-1.pdf](https://www.bop.gov/policy/progstat/5050_049_CN-1.pdf) (last visited Feb. 27, 2017); 28 C.F.R. §§ 571.63(b)–(d) (2016).

344. See *JLM*, Chapter 14, “The Prison Litigation Reform Act.”

345. See *Leja v. Sabol*, 487 F. Supp. 2d 1, 2–3 (D. Mass. 2007) (holding that perceived futility of request and/or medical condition do not relieve a prisoner of the requirement of exhaustion of administrative remedies).

your appeal. For example, some district courts have ruled that they do not have jurisdiction to hear a habeas corpus petition challenging the denial of compassionate release by the warden or the BOP.<sup>346</sup> Some courts of appeals have reached similar decisions by denying review of the BOP's refusal to bring a motion on behalf of prisoners under 18 U.S.C. § 4205(g) (the other statute covered by the BOP policy statements on early release).<sup>347</sup> Other courts that have reviewed the BOP's decisions have been unwilling to find these decisions arbitrary and capricious, which is the standard for overturning these decisions.<sup>348</sup>

## O. Federal Supervised Release

Federal supervised release is different from parole. Federal supervised release is not a way to get out of your sentence early. Instead, it is a period of supervision that you must serve after you are released from prison. Federal parole is not available for anyone who is convicted of committing a crime that took place on or after November 1, 1987. Therefore, anyone who was convicted of a federal felony or misdemeanor that took place on or after November 1, 1987, may have a term of federal supervised release included in his sentence of imprisonment. There are also certain situations in which a judge *must* include a period of supervised release in your sentence. For example, a judge must include a period of supervised release if you received a first-time conviction for a domestic violence offense or an offense for which a law requires a term of supervised release.<sup>349</sup>

### 1. How long is supervised release?

Your sentencing judge will decide how long the supervised release will last. The judge will make this decision based on several factors, including: the nature of your offense; the circumstances surrounding your offense; your personal character; the level of deterrence you require; the need to protect the public from you committing crimes in the future; the need to provide you with training and programs; the sentencing range

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346. See *United States v. Morales*, 353 F. Supp. 2d 204, 205 (D. Mass. 2005) (dismissing habeas corpus petition by terminally ill prisoner who requested compassionate relief and release from prison so he could return to Colombia, live with his family, and obtain a heart transplant, and holding the court lacked statutory authority to reduce his sentence without a motion by the Director of the BOP); *United States v. Etters*, No. 04-20115-13-JWL, 2007 U.S. Dist. LEXIS 75731, at \*1 (D. Kan. Sept. 28, 2007) (denying plaintiff's motion to modify her sentence to home imprisonment because the court lacked jurisdiction under 18 U.S.C. § 3582(c)(1) when no motion was made by the Director of the BOP). A few district courts have gone a step further, holding that even if you have exhausted your administrative appeals, the court will still not review the final decision made by the BOP under the Administrative Procedures Act because it is barred by the terms of 18 U.S.C. § 3582. See *Pham v. Fed. Bureau of Prisons*, No. 1:07-cv-0025-SEB-JMS, 2007 U.S. Dist. LEXIS 38184, at \*1–2 (S.D. Ind. May 23, 2007) (dismissing request made by a defendant with a chronic heart condition to overrule the BOP's denial of compassionate release, and holding that the decision was assigned by law to the discretion of the BOP and was therefore unreviewable under the Administrative Procedures Act); *Gutierrez v. Anderson*, No. 06-1714 (JRT/JSM), 2006 U.S. Dist. LEXIS 79580, at \*2, 5–6 (D. Minn. Oct. 30, 2006) (finding that 18 U.S.C. § 3582 barred the court “from reviewing the Warden's decision not to recommend compassionate release” and therefore denying the terminally-ill plaintiff's motion to compel compassionate release).

347. See *Turner v. U.S. Parole Comm'n*, 810 F.2d 612, 618 (7th Cir. 1987) (finding the Parole and Reorganization Act barred the court from reviewing the warden's rejection of the Parole Commissioner's recommendation to reduce plaintiff's sentence); *Simmons v. Christensen*, 894 F.2d 1041, 1043 (9th Cir. 1990) (same); *Fernandez v. United States*, 941 F.2d 1488, 1493 (11th Cir. 1991) (holding that because the BOP had the exclusive authority to make motions under 18 U.S.C. § 4205(g), a court could not review the BOP's refusal to compel compassionate release).

348. *United States v. Maldonado*, 138 F. Supp. 2d 328, 333 (E.D.N.Y. 2001) (holding that BOP's interpretation of “extraordinary and compelling circumstances,” to mean prisoners with a generally terminal medical condition that limited life expectancy by a predictable amount, was reasonable because it provided an objective way to limit eligibility while still allowing for truly exceptional circumstances to be taken into account); *Hubbs v. Dewalt*, NO. 05-CV-512-JBC, 2006 U.S. Dist. LEXIS 27950, at \*5, 11–12 (D. Ky. May 8, 2006) (*unpublished*) (holding BOP's interpretation of 18 U.S.C. § 3582(c)(1)(A), as applied to a prisoner who was a double-leg amputee, was reasonable and not arbitrary and capricious when the BOP staff based its decision on the fact that the sentencing court knew of the prisoner's condition at the time of sentencing and its interpretation of “extraordinary and compelling” was limited to terminally-ill prisoners who could not complete their sentence). In *Dewalt*, the court did not consider the other group of prisoners covered by the BOP's interpretation—those “who suffer from a severely debilitating and irreversible mental or physical medical condition and are unable to provide self-care.” 2006 U.S. Dist. LEXIS 27950, at \*5, 11–12 (D. Ky. May 8, 2006).

349. 18 U.S.C. § 3583(a) (2015).

for your offense; the similarity of your sentence to others convicted of similar offenses; and the need for you to repay the victims of your offense.<sup>350</sup>

The maximum amount of time that you can be sentenced to supervised release depends on the class of the crime for which you were convicted. For a Class A or Class B felony, the maximum length is five years. For a Class C or Class D felony, the maximum length is three years. For a Class E felony, or for a misdemeanor (other than a petty offense), the maximum length is one year.<sup>351</sup>

Your period of supervised release starts on the day that you are released from prison.<sup>352</sup> The time will run at the same time as any other Federal, State, or local period of supervised release, probation, or parole for another offense.<sup>353</sup> Any time spent in prison will not be counted towards your period of supervised release unless it is less than thirty days in a row.<sup>354</sup>

### 5. What are the conditions of supervised release?

At the time of your sentencing, the judge will include several conditions that you must follow during your period of supervised release. There are some conditions that the judge *must* include and some conditions that the judge can *choose* to include, depending on the circumstances of your case. Your probation officer must give you a written copy of the terms of your supervised release, explaining the terms in clear, understandable language.<sup>355</sup>

The following conditions *must* be included as part of your supervised release:<sup>356</sup>

- (1) You cannot commit another crime under federal, state or local law;
- (2) You cannot unlawfully possess a controlled substance;
- (3) If you were convicted for the first time of a domestic violence offense, you must complete an approved rehabilitation program if there is one within a 50-mile radius of your legal residence;
- (4) If you are a sex offender, you must:
  - a. comply with the requirements of the Sex Offender Registration and Notification Act;
  - b. cooperate in the collection of your DNA sample under the DNA Analysis Backlog Elimination Act; and
  - c. submit to a drug test within fifteen days of release and at least two more times after that.<sup>357</sup>

The following conditions *can* be included as part of your supervised release:<sup>358</sup>

- (1) If you are a sex offender, searches may be done of your person, property, and possessions upon reasonable suspicion and without a search warrant;
- (2) Deportation;
- (3) Any other condition that is related to the factors in 18 U.S.C. § 3553 that does not involve a greater limit on your liberty than is necessary (those factors are listed above in the text to footnote 348);
- (4) Any condition that could be included as a term of probation; or
- (5) Any other condition allowed by a statute.<sup>359</sup>

### 6. What happens if you violate a condition of supervised release?

Your supervised release can be revoked if you violate any of the conditions set out in your sentence. Your supervised release *must* be revoked if you are found in possession of a controlled substance or a firearm, in violation of federal law or in violation of a term of your supervised release, or if you refuse to comply with the

350. 18 U.S.C. § 3553(a)(1), (2)(B)–(D), (4)–(7) (2010).

351. 18 U.S.C. § 3583(b) (2012).

352. 18 U.S.C. § 3624(e) (2012).

353. 18 U.S.C. § 3624(e) (2012).

354. 18 U.S.C. § 3624(e) (2012).

355. 18 U.S.C. § 3583(f) (2012).

356. 18 U.S.C. § 3583(d) (2012).

357. This condition can be removed if your presentence report or other information in your sentencing file indicates that you have a low risk of future substance abuse. 18 U.S.C. § 3563(a)(5) (2012).

358. 18 U.S.C. § 3583(d) (2012).

359. 18 U.S.C. §§ 3583(d)(1)–(3) (2012). See 18 U.S.C. §§ 3563(b)(1)–(10) and (b)(12)–(20) for a list of all discretionary probation conditions that can be included as conditions of your supervised release.

drug testing requirements.<sup>360</sup> If your supervised release is revoked, you may be sentenced to serve in prison either part or all of the time you were sentenced to supervised release, without any credit for the time you spent on supervised release before its revocation.<sup>361</sup> The court may also order you to serve another term of supervised release in addition to your new term of imprisonment.<sup>362</sup> The length of the additional term of supervised release can be no longer than the maximum term allowed for under the statute covering your crime, minus the length of imprisonment for violating your supervised release.<sup>363</sup> For example, if your original maximum amount of supervised release was six months, and your term of imprisonment following the supervised release being revoked was three months, your new supervised release can be a maximum of three months. Alternatively, instead of sentencing you to more time in prison, the judge can order that you remain in your home during non-working hours and be monitored by telephone or electronic surveillance devices.<sup>364</sup>

You may participate in up to two stages of hearings before your supervised release can be revoked. When you are accused of violating the terms of your supervised release, you will be brought before a magistrate judge. The magistrate judge must tell you which violation of supervised release you are being charged with, inform you of your right to obtain an attorney or to request that an attorney be appointed for you, and inform you of your right to a preliminary hearing to determine whether or not there is enough evidence for the judge to decide that you may have violated a term of your supervised release.<sup>365</sup> If you decide not to waive the preliminary hearing, the magistrate judge will provide you with notice of the hearing, its purpose, the violation you are alleged to have committed, and your right to retain a lawyer or have a lawyer appointed. You have a right to be present at your hearing, to present evidence, and to request the right to question witnesses testifying against you.<sup>366</sup> The magistrate judge will either dismiss the case if he finds there is no probable cause to believe that you committed a violation, or the magistrate judge will order a revocation hearing.

To revoke your supervised release, the court must find at the revocation hearing that it is more likely than not that you violated a term of your supervised release.<sup>367</sup> You have the same rights in a revocation hearing that you had in the preliminary hearing, as well as a right to know what evidence will be used against you, the right to question adverse witnesses (you do not need to request to do so ahead of time), the

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360. 18 U.S.C. § 3583(g) (2012).

361. 18 U.S.C. § 3583(e)(3) (2012).

362. 18 U.S.C. § 3583(h) (2012).

363. 18 U.S.C. § 3583(h) (2015).

364. 18 U.S.C. § 3583(e)(4) (2012).

365. Fed. Rules Crim. Proc. R. 32.1(a)(3).

366. Fed. Rules Crim. Proc. R. 32.1(b)(1)(B). The 6th Amendment right to confront witnesses whose testimony will be used against you does not exist in supervised release revocation hearings. *United States v. Hall*, 419 F.3d 980, 985–86 (9th Cir. 2005) (holding that the right to confront a testimonial witness does not apply to hearsay evidence used in supervised release revocation hearings because these hearings are not criminal prosecutions (citing *United States v. Aspinall*, 389 F.3d 332, 342 (2d Cir. 2004) and *United States v. Martin*, 382 F.3d 840, 844 n.4 (8th Cir. 2004)). To determine whether you may confront an adverse witness, the judge will balance your due process right against the government's good cause for denying you this right. *United States v. Taveras*, 380 F.3d 532, 536 (1st Cir. 2004) (applying the recommendation in the 2002 Committee Advisory Note to Rule 32.1 that a balancing test be applied to protect the due process right of parolees recognized in *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)). The government's good cause in not producing the witness will be judged by the reliability of the hearsay evidence and its reason for not presenting the witness. *United States v. Rondeau*, 430 F.3d 44, 48–49 (1st Cir. 2005) (providing a full discussion of the factors considered in judging reliability and the government's reasons for not providing the witness). For a case describing reliability standards, see *United States v. Redd*, 318 F.3d 778, 785 (8th Cir. 2003) (finding that the interest of the releasee in confronting the lab technician who ran his sweat patch reports that showed cocaine use at his supervised release revocation hearing was minimal due to long-established recognition of the reliability of documentary evidence). For a case describing the government's reason for not providing the witness, see *United States v. Williams*, 443 F.3d 35, 45–46 (2d Cir. 2006) (finding that the releasee waived his right to confront the witness where the witness would not come forward to present evidence against him out of fear and intimidation caused by threats made by the releasee's acquaintances). Your interest in confrontation is determined by the circumstances of your individual case including the importance of the evidence to the court's finding, your ability to show the evidence was false, and the consequences of the court's decision on factors other than the revocation of your supervised release. *United States v. Walker*, 117 F.3d 417, 420 (9th Cir. 1997), *cert. denied*, 522 U.S. 961 (1997).

367. 18 U.S.C. § 3583(e)(3) (2012).

right to present information about mitigating factors in your case, and the right to see the witnesses' prior statements.<sup>368</sup> You may give up ("waive") these rights, but your waiver will only be valid if you knew what the waiver meant and chose to do so voluntarily.<sup>369</sup> At a revocation hearing, any evidence may be used against you, even evidence taken without probable cause:<sup>370</sup> you cannot defend yourself by saying that the government gathered evidence improperly.

### 7. Can you change the length or conditions of your supervised release?

In addition to being revoked, your period of supervised release can also be ended or modified at your request or the court's. Usually there will be a hearing before the court terminates or modifies a condition of your supervised release. At the hearing, you will have the right to counsel, to make a statement on your own behalf, and to present evidence showing circumstances why the court should decide in your favor.<sup>371</sup> No hearing is required if you waive the right to a hearing, if the change will benefit you and will not extend the length of your supervised release, or if the government attorney does not object to the change you requested after having received notice and having had reasonable time to object.<sup>372</sup> You can also apply to the court to clarify the terms of your supervised release if you are unsure what a particular condition means or whether or not you have met the requirements for that condition.<sup>373</sup>

### 8. How can you terminate your supervised release?

You can apply to terminate your period of supervised release by either appealing to the court or to the President of the United States through a commutation petition (see Part P below). After you have served one year and one day of your supervised release, you can appeal to the court to have the remaining amount of time on your supervised release sentence discharged.<sup>374</sup> If you apply before you have served at least one year and one day of supervised release, the court will dismiss your petition.<sup>375</sup> In deciding on your request, the court will first look at "many of the same factors" used to determine your original sentence.<sup>376</sup> It will then decide whether terminating your supervised release is in the interests of justice and warranted by your post-release conduct.<sup>377</sup> The court is not required to hold a hearing to decide your request for termination because its decision cannot extend the time you will have to spend on supervised release—it can only lower it.<sup>378</sup>

### 9. How can you change the terms of your supervised release?

You can petition the district court to modify a condition of your supervised release if your circumstances have changed since the time of your sentencing or you believe the condition places a heavy limit on your liberty without meeting any goals of your supervised release. If a condition of supervised release places too great a burden on a protected liberty interest, without furthering your rehabilitation or protecting the public, a court can order the condition be changed to include no greater limit on your liberty than necessary

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368. Fed. R. Crim. Proc. R. 32.1(b)(2); Fed. R. Crim. Proc. R. 26.2(g)(3).

369. *United States v. Correa-Torres*, 326 F.3d 18, 22 (1st Cir. 2003) (ordering a new hearing for plaintiff whose supervised release was revoked after waiver of his rights at his first revocation hearing when he did not know what his rights were or what the charges were against him).

370. *United States v. Hebert*, 201 F.3d 1103, 1104 (9th Cir. 2000) (holding that the exclusionary rule does not apply at supervised release revocation hearings).

371. Fed. R. Crim. Proc. R. 32.1(c)(1).

372. Fed. R. Crim. Proc. R. 32.1(c)(2).

373. *United States v. Lilly*, 206 F.3d 756, 762 (7th Cir. 2000) (recognizing plaintiff's right to have the district court clarify whether or not he had met the repayment ordered as a part of his supervised release).

374. 18 U.S.C. § 3583(e)(1) (2012).

375. *United States v. Werber*, No. 90 Cr. 364 (LLM), 1995 U.S. Dist. LEXIS 12307, 1995 WL 506981 (S.D.N.Y. Aug. 25, 1995) (*unpublished*) (defendant had not yet served one year of supervised release, and therefore could not move to terminate the term under 18 U.S.C. § 3583(e)(1)).

376. *United States v. Lussier*, 104 F.3d 32, 34–35 (2d Cir. 1997).

377. 18 U.S.C. § 3583(e)(1) (2012).

378. *United States v. Lai*, 458 F. Supp. 2d 177, 177 (2d Cir. 2006) (finding that releasee was not entitled to a hearing on his request for termination of the remaining 14 months of his period of supervised release under Fed. R. Crim. Proc. R. 32.1(c). This rule explains that hearings are not required if your request does not extend the term of your probation and the request benefits you).

to meet your supervised release goals.<sup>379</sup> The court will first determine whether you have a recognized liberty interest<sup>380</sup> affected by the challenged condition and then determine the sentencing goal of that condition and its reasonableness.<sup>381</sup> The sentencing goal may relate to the offense for which you are currently in prison or to a past offense.<sup>382</sup> The court will not approve your requested change if your reason for the change is outweighed by the government's interest in the condition being maintained.<sup>383</sup>

The court can also modify the conditions of your supervised release on its own or in response to a request by your probation officer at any time before the end of your term of supervised release.<sup>384</sup> The court can add additional conditions of supervised release to your sentence and/or correct your sentence to include the conditions of supervised release as long as the court provides you with a hearing as described in the introduction to this section<sup>385</sup> and the new conditions relate to a rehabilitation goal and do not unduly limit your liberty interests.<sup>386</sup>

## P. Federal Executive Clemency

The President of the United States has the constitutional power to pardon, commute, or reprieve a sentence, and to forgive fines, for conviction of a federal offense.<sup>387</sup> It is important to note that clemency is usually not granted: during the Obama Presidency up to 2016 a total of 70 pardons and 187 commutations have been granted, but 1,629 pardon requests and 8,123 commutation requests were denied.<sup>388</sup> The main forms of relief explained in this section—pardon and commutation—only apply to convictions for federal crimes.<sup>389</sup> See Part I of this Chapter for information on how to seek clemency for New York State convictions.

For federal sentences, pardons and commutations are very different. A pardon restores civil rights that were taken away when you were sentenced. A commutation can shorten the amount of time that you must serve in prison or in supervised release. Because a pardon does not reduce your sentence, it will be discussed

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379. *United States v. Monteiro*, 270 F.3d 465, 472–73 (7th Cir. 2001) (ordering a condition of supervised release allowing law enforcement to conduct warrantless seizures of plaintiff, his car, or his home be rewritten by the court to limit the seizure power “to ensure that it relates reasonably to the ends of rehabilitation and protection of the public”).

380. *See United States v. Myers*, 426 F.3d 117, 125 (2d Cir. 2005) (describing recognized liberty interests as those that are constitutionally protected); *see also United States v. Holman*, 532 F.3d 284, 290 (4th Cir. 2008) (discussing fundamental rights and supervised release in the context of involuntary medication orders).

381. *United States v. Meyers*, 426 F.3d 117, 125–30 (2d Cir. 2005) (removing as a condition of supervised release that the plaintiff receive approval from his probation office before he could have contact with his minor son where his original sentence for child pornography involved only females and where there was no record demonstrating that his son would be harmed by contact with him or that any sentencing goal that protected other children would be served by this condition, which interfered with his liberty interest in maintaining his parental relationship with his son).

382. *United States v. Dupes*, 513 F.3d 338, 344 (2d Cir. 2008) (upholding conditions of supervised release for defendant, who was convicted of securities fraud, including: registration as a sex offender; attending sex offender treatment; staying away from places where children are often located; and not using the internet for child pornography, because—given his past conviction for and history of sexual offenses—such conditions were not overly broad or vague and were appropriate to the sentencing goals of providing defendant with needed treatment and protecting the public from defendant).

383. *United States v. Nonahal*, 338 F.3d 668, 670–71 (7th Cir. 2003) (denying the condition modification request by releasee that he report to his probation officer by mail instead of in person so that he could attend school in Pakistan because the government's interest in maintaining close supervision over the releasee outweighed his interest in attending school at that time).

384. 18 U.S.C. § 3583(e)(2) (2012).

385. *United States v. Navarro-Espinosa*, 30 F.3d 1169, 1171 (9th Cir. 1994) (upholding district court's sentence against releasee, which was amended under 35 U.S.C. § 3583(e)(2) to include the four years of supervised release that the court had inadvertently neglected to mention when first pronouncing sentence).

386. *United States v. Davies*, 380 F.3d 329, 333 (8th Cir. 2004) (holding court's adding a condition of supervised release requiring releasee to participate in an alcohol abuse program was not an abuse of discretion because it met releasee's rehabilitation goals, given his alcoholism and depression history, and did not violate his liberty interests because it was less intrusive than a ban on drinking alcohol).

387. U.S. Const. art. II, §2; *see also* 28 C.F.R. § 1.1 (2016).

388. U.S. Dept. of Justice, Clemency Statistics, *available at* <https://www.justice.gov/pardon/clemency-statistics> (last visited Feb. 28, 2017).

389. 28 C.F.R. § 1.4 (2016).

only briefly. This section does not deal with federal executive clemency for military offenses or for people who are sentenced to death, both of which involve separate petition procedures and considerations.

## 1. Pardons

A federal pardon does *not* allow you to get out of your sentence early. Instead, a federal pardon allows you to have your federal conviction officially forgiven and your civil rights restored. It does not mean you are innocent. Because pardons are a showing of forgiveness for your crime and not innocence, you must show remorse and rehabilitation, and good behavior after release from prison. It is important to remember a pardon will not erase your conviction. So, any time you are asked to list your convictions you must still include the pardoned offense.<sup>390</sup> But you can also note that you received a federal pardon for the offense.<sup>391</sup>

You must wait five years after the date of your release from prison before you can seek a presidential pardon.<sup>392</sup> You cannot request a pardon while you are on supervised release, parole, or probation.<sup>393</sup> If there are exceptional reasons why you need the pardon *now* and cannot wait until the five year period is over, then you can request a waiver. To get a waiver, write a separate letter, stating why you think the waiting period should be waived and submit it with your pardon application. Waivers, however, are very rarely granted.<sup>394</sup>

Even after the five-year waiting period, you need to explain why you are seeking a pardon. Examples include gaining entry into a professional association; obtaining licenses from government authorities; restoration of your civil rights; and accessing benefits provided by administrative agencies. It is important to note that many of your civil rights (for example, your voting rights) are governed by the state where you were convicted and not by the federal government. So, you might want to pursue state clemency procedures instead of, or in addition to, federal procedures to increase your chance of success.<sup>395</sup>

To request a federal pardon you must submit a completed, signed, and dated pardon form to the United States Pardon Attorney at:

Office of the Pardon Attorney  
145 N Street N.E.  
Room 5E.508  
Washington, DC 20530

Pardon forms are available online at: [https://www.justice.gov/pardon/forms/pardon\\_form.pdf](https://www.justice.gov/pardon/forms/pardon_form.pdf).

## 2. Commutations

A commutation of your sentence is a reduction of your sentence's length. A commutation can change your sentence to time served, shorten your imprisonment period so you can be released early, move up the date of your parole hearing,<sup>396</sup> or shorten or terminate your sentence of supervised release.<sup>397</sup> Commutations are rarely granted. Commutation is purely discretionary, which means that it is up to the President to decide,

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390. U.S. Dept. of Justice, Frequently Asked Questions Concerning Executive Clemency, *available at* <https://www.justice.gov/pardon/frequently-asked-questions-concerning-executive-clemency> (last visited Feb. 28, 2017).

391. U.S. Dept. of Justice, Frequently Asked Questions Concerning Executive Clemency, *available at* <https://www.justice.gov/pardon/frequently-asked-questions-concerning-executive-clemency> (last visited Feb. 28, 2017).

392. 28 C.F.R. § 1.2 (2016).

393. 28 C.F.R. § 1.2 (2016).

394. U.S. Dept. of Justice, Pardon Information and Instructions, *available at* <https://www.justice.gov/pardon/pardon-information-and-instructions> (last visited Feb. 27, 2017).

395. U.S. Dept. of Justice, Pardon Information and Instructions, *available at* <https://www.justice.gov/pardon/pardon-information-and-instructions> (last visited Feb. 27, 2017).

396. U.S. Attorney's Office, Dept. of Justice, United States Attorney's Manual: Standards for Consideration of Clemency Petitions § 1-2.113 (1997), *available at* <https://www.justice.gov/pardon/about-office-0> (last visited Feb. 28, 2017); *see also* Nicholson-El v. Conley, No. 5:01-0798, 2001 U.S. Dist. LEXIS 24168, at \*2-3, footnote 1 (S.D.W. Va. Nov. 27, 2001) (*unpublished*) (noting that petitioner's commutation from President Carter made him immediately eligible for a parole hearing for his two sentences, but did not change the sentences to make them run concurrently).

397. If you are requesting that your period of supervised release be terminated, you must state specifically on your petition that this is the type of relief you are seeking and why serving it would be an undue hardship on you as well as why you cannot obtain the same benefit through a petition under 18 U.S.C. § 3583(e)(1). U.S. Dept. of Justice, Commutation Instructions, *available at* [http://www.usdoj.gov/pardon/commutation\\_instructions.htm](http://www.usdoj.gov/pardon/commutation_instructions.htm) (last visited Feb. 28, 2017). See Part O(5) of this Chapter for more information on termination of supervised release.

and he does not have to issue a commutation if he does not think it is appropriate. The President does not have to state his or her reasons for granting or denying your petition for commutation. You have no right to appeal the denial of your request for commutation.

#### (a) Eligibility

In general, your petition for commutation will not be reviewed unless you have started serving your sentence and are not currently appealing or challenging your sentence in court.<sup>398</sup> You cannot apply for a commutation of sentence, except in exceptional circumstances, if you have any other forms of judicial or administrative relief available, including:<sup>399</sup>

- (1) A motion by the government under Federal Rule of Criminal Procedure 35 (for providing substantial assistance to the government), or
- (2) A petition for compassionate release under 18 U.S.C. § 3582(c)(1).<sup>400</sup>

Examples of exceptional or unusual circumstances are: terminal illness or old age, the severity (harshness) of the sentence, ineligibility for parole, and providing beneficial assistance at the request of the government in the investigation or prosecution of another case.<sup>401</sup> These are also the reasons commutations are usually granted. If any of these exceptional or unusual circumstances are present in your case, the Pardon Attorney, who assists the President, will consider your application. But the Pardon Attorney will still consider the availability of other means of relief and the amount of time you have already served when reviewing your application.<sup>402</sup> For example, President George W. Bush granted a commutation of Lewis Libby's sentence of imprisonment, which was at the low end of the Sentencing Guidelines' range, because it was too harsh. The President announced in his Statement on the Executive Clemency for Libby that he considered critics' "arguments and the circumstances surrounding this case," as well as the fact that "the district court rejected the advice of the probation office, which recommended a lesser sentence and the consideration of factors that could have led to a sentence of home confinement or probation."

To be considered for federal commutation, send a written petition requesting a commutation of your sentence, addressed to the President of the United States, to the following address:

Office of the Pardon Attorney  
145 N Street N.E.  
Room 5E.508  
Washington, DC 20530

If you would like your petition to be sent faster, you must submit it through your facility's warden. There are several benefits to sending your petition through the warden, including assistance in obtaining documents. Therefore, this is the method described in this Section.

#### (i) Obtain and Complete the Petition for Commutation Form

You can obtain the petition for commutation form by requesting it from the Pardon Attorney or the warden in your facility.<sup>403</sup> When you complete the form, you must state the truth or you could be fined and/or imprisoned.<sup>404</sup> The form should be easy to read and completed in pen or typewritten.

On the form you will need to include the following information:

- (1) The date(s) when you have previously applied for commutation (if any) and the result(s);

398. U.S. Attorney's Office, Dept. of Justice, United States Attorney's Manual: Standards for Consideration of Clemency Petitions § 1-2.113 (1997), *available at* <http://www.usdoj.gov/pardon/petitions.htm> (last visited Feb. 28, 2017).

399. 28 C.F.R. § 1.3 (2016). *See also* U.S. Dept. of Justice, United States Attorney's Manual: Standards for Consideration of Clemency Petitions § 1-2.113 (1997), *available at* <http://www.usdoj.gov/pardon/petitions.htm> (last visited Feb. 28, 2017).

400. See Part J of this Chapter for information about compassionate release in New York State.

401. U.S. Dept. of Justice, United States Attorney's Manual: Standards for Consideration of Clemency Petitions § 1-2.113 (1997), *available at* <https://www.justice.gov/pardon/about-office-0> (last visited Feb. 28, 2017).

402. U.S. Dept. of Justice, United States Attorney's Manual: Standards for Consideration of Clemency Petitions § 1-2.113 (1997), *available at* <https://www.justice.gov/pardon/about-office-0> (last visited Feb. 28, 2017).

403. 28 C.F.R. § 1.1 (2016). The form is also available at [https://www.justice.gov/sites/default/files/pardon/legacy/2007/06/12/commutation\\_form.pdf](https://www.justice.gov/sites/default/files/pardon/legacy/2007/06/12/commutation_form.pdf) (last visited Feb. 28, 2017).

404. 18 U.S.C. § 1001 (2012); 18 U.S.C. § 3571 (2012).

- (2) The offense(s) that you are seeking to have commuted (including district of conviction, citation of offense if known, and sentence);
- (3) The date(s) of any criminal appeals you have filed on your case (if any), the result(s), and the citation to the opinion(s);
- (4) The date(s) of any habeas corpus petition(s) you have filed to challenge your conviction (if any), the result(s), and the citation to the opinion(s);
- (5) Your story of the events that took place during the offense you were convicted of and what your involvement was in those events;
- (6) A list of all of your other arrests and convictions, including any juvenile records (the date, the charge, the arresting agency, and the outcome); and
- (7) The reasons you are seeking commutation.

(ii) Submit the form to the warden to be sent to the Pardon Attorney

When you send the petition through the warden at your facility, it will be assigned to a case manager who has thirty days to get the required documents together and submit them to the warden for signature.<sup>405</sup> Your case manager must include with your petition a pre-sentence Investigation Report (if available), Judgment in a Criminal Case, and your most recent Progress Report, if one already exists.<sup>406</sup> Any requests for additional information will be sent directly to the warden.

(iii) Review of Your Petition

Once the Pardon Attorney receives your petition, the Pardon Attorney will conduct an investigation of your case. The Pardon Attorney or the Attorney General may contact other government officials (including your sentencing judge, the Director of the BOP, and the U.S. Attorney in the district where you were convicted) to get their opinions about whether or not your request for commutation should be granted by the President.<sup>407</sup> If you are requesting commutation for a felony offense that involved a victim, the Attorney General may send a notice to the victim (or their spouse, adult child, or parent, if the victim is deceased) to ask if he or she would like to submit an opinion regarding your request. A victim is someone who has “suffered direct or threatened physical, emotional, or pecuniary harm as a result of the commission of the crime for which clemency is sought” and has filed a request with the BOP to be notified upon your release.<sup>408</sup>

After the Pardon Attorney has received and reviewed the reports on your case, he will make a recommendation to the President to deny or approve your petition.<sup>409</sup> If the Pardon Attorney recommends that the President deny your application and the President does not take any other action within thirty days of receiving the recommendation, your petition will be denied and your case closed.<sup>410</sup> Your case can also be closed if the President denies your application directly after reviewing it.<sup>411</sup> You will receive notice about the denial from the warden at your facility.<sup>412</sup> You are not entitled to any appeal if your application is denied.

If the President approves your petition for commutation, a warrant of commutation is sent to the warden, who will deliver it to you.<sup>413</sup> If you are already on parole or supervised release when your petition is granted, the warrant will go to you directly.<sup>414</sup> Your sentence will then be recalculated and, if you are now eligible for a parole hearing, you will be added to the docket.<sup>415</sup> It is important to note in this case that even though you have a right to a parole hearing, you are not guaranteed to be granted parole.

405. Fed. Bureau of Prisons, Program Statement 1330.15 at 3 (2001), [https://www.bop.gov/policy/progstat/1330\\_015.pdf](https://www.bop.gov/policy/progstat/1330_015.pdf) (last visited Feb. 28, 2017).

406. Fed. Bureau of Prisons, Program Statement 1330.15 at 3 (2001), [https://www.bop.gov/policy/progstat/1330\\_015.pdf](https://www.bop.gov/policy/progstat/1330_015.pdf) (last visited Feb. 28, 2017).

407. See 28 C.F.R. § 1.6 (2016).

408. 28 C.F.R. § 1.6(b)(3) (2016).

409. 28 C.F.R. § 1.6(c) (2016).

410. 28 C.F.R. § 1.8(b) (2016).

411. 28 C.F.R. § 1.8(a) (2016).

412. Fed. Bureau of Prisons, Program Statement 1330.15 at 5 (2001), [https://www.bop.gov/policy/progstat/1330\\_015.pdf](https://www.bop.gov/policy/progstat/1330_015.pdf) (last visited Feb. 28, 2017).

413. 28 C.F.R. § 1.7 (2016).

414. 28 C.F.R. § 1.7 (2016).

415. Fed. Bureau of Prisons, Program Statement 1330.15, at 5 (2001),

### Q. Conclusion

If you are in New York State prison and would like to try to get out before serving your maximum sentence, three types of release programs (and parole) exist: (1) conditional, (2) early, and (3) presumptive release. The type of sentence you are serving affects your program eligibility. In general, you can decrease the amount of time in prison by showing good behavior, because good behavior can earn you good-time credit. If you have applied unsuccessfully for a release program, have not acquired the required amount of good time, or have not served enough of your underlying sentence to qualify, you can also petition for a pardon or commutation, which allows you to leave prison immediately. Note that you can pursue several options at the same time.

If you are in a federal prison and would like to try to get out before serving your full sentence, you may be able to be released through (1) good conduct time, (2) the Residential Drug Abuse Program ("RDAP"), (3) the Second Chance Act, and (4) compassionate relief. In addition, you can receive credit for time already served and this credit can be used to decrease your sentence. Finally, keep in mind that you can also apply to have your sentence of imprisonment or supervised release reduced by the U.S. President through a commutation petition.

Some of these methods can be used together to reduce your sentence (for example, good-conduct time and early release under RDAP can be combined) while others may be pursued as alternate ways to reduce your sentence (for example, compassionate relief *or* executive clemency). You can pursue several of these options at the same time to try to reduce your federal sentence.