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. If you are incarcerated in a New York state prison, you should read Parts B through J of this Chapter, which discuss New York State law. If you are incarcerated in federal prison, you should read Parts K through P of this Chapter, which discuss federal law. If you are incarcerated in a state prison other than a New York prison, the rules could be similar to New York's or they could be very different. So, it is very important to look at your state's laws and regulations. *JLM*, Chapter 2, "Introduction to Legal Research," can help you learn the basics of researching this information.

B. New York State

There are four main ways that you can be released from a New York state prison 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. For information about parole, see *JLM*, Chapter 32, "Parole."

You must do two things to determine if you are eligible for one of these early release programs. First, you must figure out which type of sentence you are serving. Second, you must figure out whether you have earned good-time credit and, if so, how much good-time credit you have earned. Parts C and D will help you figure this out. **Part C** 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. **Part E** explains another type of credit, called merit-time credit, which can help shorten certain sentence types. Once you have figured out if you are eligible, you should learn about the different types of release. **Part F** explains conditional release, **Part G** explains early release, and **Part H** explains presumptive release.

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 a criminal defendant's sentence to prevent injustice from occurring.[2] "Compassionate release" means a program for releasing dying or seriously ill incarcerated people, or incarcerated people with other extenuating circumstances. Clemency and compassionate release are harder to get than conditional, early, and presumptive release. If you are interested in pursuing these options, **Part I** explains clemency (with a focus on battered women) and **Part J** 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 your

---

* This Chapter was revised by Jarrell Mitchell, based in part on previous versions by Natasha Korgaonkar, Joe McFadden, Margo Eakin, Emily O'Connor, Bartram S. Brown, and Holly Chen. Special thanks to Professor Philip Genty and Steve Statsinger for their comments.

[2] New York State, Department of Corrections and Community Supervision, *Apply for Clemency*, *available at* www.ny.gov/services/apply-clemency (last visited Oct. 07, 2023).

sentence type 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, violation, or certain felonies.[3] 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.[4] A violation carries a maximum definite sentence of fifteen days.[5] If you were convicted of a Class A misdemeanor, your maximum definite sentence is 364 days.[6] If you were convicted of a Class B misdemeanor, your maximum definite sentence is three months.[7] You serve a definite sentence in a county or regional jail, unless you have also received an additional determinate or indeterminate sentence.[8]

A determinate sentence is the type of sentence given to persons convicted of most types of violent felonies,[9] drug felonies,[10] and felony sex offenses.[11] 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 last more than one year, the minimum determinate sentence is one-and-a-half years.[12] You usually serve a determinate sentence in state prison.[13]

An indeterminate sentence is the type of sentence given to you if you are convicted of a felony not requiring a determinate sentence.[14] An indeterminate sentence is not for a fixed term. 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).[15] 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. You generally serve an indeterminate sentence in state prison.[16]

It is important to understand 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

---

[3] N.Y. PENAL LAW § 70.15 (McKinney 2021). Note that, if convicted of certain felonies (including drug offenses and sex offenses), the judge may, at his discretion, sentence you to a determinate sentence. N.Y. PENAL LAW §§ 70.00(4), 70.20(2), 70.70(2)(c), (3)(e), 70.80(4)(c) (McKinney 2021).

[4] N.Y. PENAL LAW § 70.15 (McKinney 2021).

[5] N.Y. PENAL LAW § 70.15(4) (McKinney 2021).

[6] N.Y. PENAL LAW § 70.15(1) (McKinney 2021).

[7] N.Y. PENAL LAW § 70.15(2) (McKinney 2021).

[8] N.Y. PENAL LAW § 70.20(2) (McKinney 2021). Youth and adolescent offenders are "committed to the custody of the commissioner of the office of children and family services who shall arrange for the confinement of such offender in secure facilities of the office." N.Y. PENAL LAW § 70.20(4)(a) (McKinney 2021).

[9] N.Y. PENAL LAW § 70.02(2)(a)–(c) (McKinney 2009) (defining the various classes of felony offenses subject to determinate sentence); N.Y. PENAL LAW § 70.04(2) (McKinney 2021) (stating current requirement to impose a determinate sentence for second violent felony offenders). Starting September 1, 2020, 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) (McKinney 2009), 70.04(2) (McKinney 2021).

[10] N.Y. PENAL LAW § 70.70(2) (McKinney 2021).

[11] N.Y. PENAL LAW § 70.80(3) (McKinney 2021).

[12] N.Y. PENAL LAW § 70.02(3)(d) (McKinney 2009).

[13] N.Y. PENAL LAW § 70.20(1)(a) (McKinney 2021). Note that, if convicted of certain felonies (including drug offenses and sex offenses), the judge may, at his discretion, sentence you to a determinate sentence. N.Y. PENAL LAW §§ 70.70(2)(c), (3)(e), 70.80(4)(c) (McKinney 2021).

[14] N.Y. PENAL LAW § 70.00(1) (McKinney 2009).

[15] N.Y. PENAL LAW § 70.00(2) (McKinney 2009).

[16] N.Y. PENAL LAW § 70.20(1)(a) (McKinney 2021).

sentences. Below is a brief overview of good-time credit, and 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.[17] If you are serving a definite sentence, and you earn good-time credit, you can use the credit to shorten your sentence. You cannot, however, use the credit to get 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 get 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 during certain hours of the day), you are ineligible for good-time credit.[18] 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 parolees. Additionally, you must follow the rules set by the parole or probation department, or you could lose your conditional release and be sent back to prison. 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. You can get presumptive release 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 bother) 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."[19] On the other hand, you can lose good-time credits for "bad behavior, violation of institutional rules or

---

[17] N.Y. CORRECT. LAW §§ 804(1), 803(1) (McKinney 2014).

[18] N.Y. CORRECT. LAW § 803(1) (McKinney 2014); N.Y. PENAL LAW § 85.00(3) (McKinney 2021); *see also* Ferrara v. Jackson, 99 A.D.2d 545, 546, 471 N.Y.S.2d 629, 630 (2d Dept. 1984) (holding that incarcerated people serving intermittent sentences in accordance with Article 85 of the New York Penal Law are ineligible for good behavior allowances).

[19] N.Y. CORRECT. LAW §§ 803(1), 804(1) (McKinney 2014).

failure to perform properly" any duties or programs assigned to you in prison.[20] If you fail to complete a "recommended" program, prison officials may also withhold good-time credits.[21]

You do not have a right to good-time credits.[22] 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 give 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.[23]

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 can get unconditional early release. The process where prison officials decide whether to grant you good-time credit depends on whether you are incarcerated in jail or prison. If you are serving your definite sentence in a county or regional jail, the sheriff, warden, or other person in charge of the jail will decide whether to give you good-time credit.[24] If you are serving your definite sentence in a state prison, the prison's Time Allowance Committee ("TAC") will recommend to the superintendent the amount of good-time credit it thinks you should receive.[25] Every prison in New York is required to have a TAC consisting of at least eight prison employees.[26] 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.[27]

(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 your 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.

---

[20] N.Y. CORRECT. LAW §§ 803(1), 804(1) (McKinney 2014).

[21] *See* Ferry v. Goord, 268 A.D.2d 720, 721, 704 N.Y.S.2d 315, 316 (3d Dept. 2000) (finding that good-time credit was properly withheld where an incarcerated person refused to enroll in recommended and 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 (3d Dept. 2000) (finding that good-time credit was lawfully withheld where an incarcerated person refused to enroll in recommended sex offender program); Lamberty v. Schriver, 277 A.D.2d 527, 528, 715 N.Y.S.2d 510, 511 (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).

[22] *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 2014).

[23] Holtzinger v. Estelle, 488 F.2d 517, 518 (5th Cir. 1974) (holding that based on Texas statutes, a person incarcerated in Texas was not entitled to good-time credit earned for time spent in California); Alexander v. Wilson, 540 P.2d 331, 334 (Colo. 1975) (finding that the Colorado legislature had not extended good-time credit to incarcerated people for time spent outside of a Colorado state prison).

[24] N.Y. CORRECT. LAW § 804(3) (McKinney 2014).

[25] N.Y. COMP. CODES R. & REGS. tit. 7, § 261.2 (2020).

[26] N.Y. COMP. CODES R. & REGS. tit. 7, § 261.1(a)–(b) (2020).

[27] N.Y. COMP. CODES R. & REGS. tit. 7, § 262.1(b) (2020).

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 earn conditional release. During the review, the TAC will decide whether you should, in fact, receive the maximum amount of good-time credit.[28] 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.[29] All of these aspects of your behavior will be considered in light of (1) your attitude, (2) your capacity (meaning your ability), and (3) the efforts you made within your capacity.[30] Although the TAC will review your entire file, it is not required to interview you at this stage.[31]

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.[32] The TAC will notify you at least forty-eight hours before the hearing.[33] 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 have 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.[34] In other words, the TAC has the power to decide whether or not to hear witnesses. After the hearing, the TAC will make its recommendation to the superintendent.[35] The TAC will inform you of any factual circumstances that appear to support its decision to not authorize good-time credit.[36] After the TAC provides this information, it has to give you the opportunity to comment on its decision and make a statement that can be submitted about your good-time credit and time allowance.[37]

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.[38] The Commissioner can (1) accept the recommendation, (2) change the amount of good-time credit granted, or (3) send the report back to the TAC for reconsideration.[39] Once the Commissioner makes a decision, you will receive a copy of the determination.[40]

If the Commissioner does not grant the maximum amount of good-time credit, you can file a lawsuit in state court under Article 78 of the New York Civil Practice Law and Rules. For more information about bringing a lawsuit in state court, you should read *JLM*, Chapter 22, "How to

---

[28] N.Y. COMP. CODES R. & REGS. tit. 7, § 261.3(a) (2020).

[29] N.Y. COMP. CODES R. & REGS. tit. 7, § 260.3(b)(1)–(3) (2020).

[30] N.Y. COMP. CODES R. & REGS. tit. 7, § 260.3(b)(1)–(3) (2020).

[31] 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) (2020).

[32] N.Y. COMP. CODES R. & REGS. tit. 7, § 261.4(a) (2020).

[33] N.Y. COMP. CODES R. & REGS. tit. 7, § 261.4(b) (2020).

[34] N.Y. COMP. CODES R. & REGS. tit. 7, § 261.4(f) (2020).

[35] N.Y. COMP. CODES R. & REGS. tit. 7, § 262.1(a) (2020).

[36] N.Y. COMP. CODES R. & REGS. tit. 7, § 261.4(g) (2020)

[37] N.Y. COMP. CODES R. & REGS. tit. 7, § 261.4(g) (2020)

[38] N.Y. COMP. CODES R. & REGS. tit. 7, § 262.1(b) (2020).

[39] N.Y. COMP. CODES R. & REGS. tit. 7, § 262.1(c) (2020).

[40] N.Y. COMP. CODES R. & REGS. tit. 7, § 262.1(d) (2020).

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 file 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 definite sentences "consecutively" (meaning, one after the other), you can earn good-time credits equal to one-third of the total length of your combined sentences.[41] 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.[42] If you are serving a determinate sentence, the maximum good-time credit you can earn is one-seventh of your sentence.[43] 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 term.[44] 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.[45] 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, after twelve years, 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.[46] For example, if

---

[41] N.Y. CORRECT. LAW § 804(1)–(2) (McKinney 2014).

[42] N.Y. CORRECT. LAW § 803(1)(a) (McKinney 2014).

[43] N.Y. CORRECT. LAW § 803(1)(c) (McKinney 2014).

[44] N.Y. CORRECT. LAW § 803(1)(b) (McKinney 2014).

[45] N.Y. CORRECT. LAW § 803(2)(c) (McKinney 2014).

[46] N.Y. CORRECT. LAW § 803(2)(d) (McKinney 2014).

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 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.[47] 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.[48] 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.[49] 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.[50] 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

---

[47] N.Y. CORRECT. LAW § 803(2)(a) (McKinney 2014).

[48] N.Y. CORRECT. LAW § 803(2)(b) (McKinney 2014).

[49] N.Y. CORRECT. LAW § 803(2)(e) (McKinney 2014).

[50] N.Y. CORRECT. LAW § 803(2)(f) (McKinney 2014).

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 your punishment cannot be increased if stricter laws are passed after you committed the offense.[51] 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.[52]

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.[53] Second, officials may penalize you with a loss of good-time credits after a disciplinary hearing.[54] 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 an incarcerated person 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.[55] 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.[56]

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.[57]

4. Challenging the Loss of Good-Time Credit

The Supreme Court has ruled that because good-time credit leads to a shorter time in prison, procedures that take away good-time credit must meet the requirements of the U.S. Constitution's

---

[51] *See* Weaver v. Graham, 450 U.S. 24, 30–33, 101 S. Ct. 960, 964–966, 67 L. Ed. 2d 17, 22–24 (1981) (holding that applying new requirements for good-time credit to an incarcerated person 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).

[52] 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."

[53] N.Y. COMP. CODES R. & REGS. tit. 7, § 261.3(c) (2020).

[54] N.Y. COMP. CODES R. & REGS. tit. 7, § 254.7(a)(ii) (2020).

[55] N.Y. COMP. CODES R. & REGS. tit. 7, § 260.4(b) (2020).

[56] N.Y. COMP. CODES R. & REGS. tit. 7, § 261.3(b) (2020).

[57] N.Y. CORRECT. LAW § 803(5) (McKinney 2014).

Due Process Clause.[58] This means that 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.

E. Merit-Time Credit

In addition to good-time credit, incarcerated people may also earn merit-time credit. Merit-time credit can shorten certain indeterminate and determinate sentences.[59]

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).[60] 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, 2005 and September 1, 2011.[61] If you were serving an indeterminate sentence for a non-violent crime during this time period,[62] you may receive merit-time allowances of up to one-sixth of the minimum period of your sentence.[63] 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.

---

[58] 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, 487, 115 S. Ct. 2293, 2302, 132 L. Ed. 2d 418, 432 (1995) (holding that neither the Due Process Clause nor the Hawaii prison regulation in question created a liberty interest that would entitle Conner to the procedural protections set forth in *Wolff v. McDonnell* ; 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").

[59] N.Y. STATE DEPT. OF CORRECTIONS AND COMMUNITY SUPERVISION PROGRAMS, *Earned Eligibility / Merit Time / Presumptive Release / Supplemental Merit Time / Limited Credit Time Allowance*, *available at* https://doccs.ny.gov/earned-eligibility-merit-time-presumptive-release-supplemental-merit-time-limited-credit-time (last visited Feb. 23, 2023).

[60] N.Y. CORRECT. LAW § 803(1)(d)(iii) (McKinney 2014). Information about merit-time credits is available online. *See* New York State Department of Corrections and Community Supervision Programs, *available at* https://doccs.ny.gov/earned-eligibility-merit-time-presumptive-release-supplemental-merit-time-limited-credit-time (last visited Feb. 23, 2023).

[61] N.Y. CORRECT. LAW § 803(1)(d)(v) (McKinney 2014).

[62] Under New York state law, an incarcerated person 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 incarcerated individual. N.Y. CORRECT. LAW § 803(1)(d)(ii) (McKinney 2014).

[63] N.Y. CORRECT. LAW § 803(1)(d)(iii) (McKinney 2014).

Merit-time credit may also shorten determinate sentences for certain felony drug crimes by one seventh.[64] This is in addition to good time credit.[65] Merit-time credit is only available to incarcerated people who were sentenced to a qualifying determinate sentence before September 1, 2011.[66] 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.[67] 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).

To obtain merit-time credit you must also complete other requirements. First, you must successfully complete a work and treatment program.[68] 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.[69] Frivolous means the 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.[70] 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 may be eligible for conditional release after you have served sixty days of your sentence.[71] Conditional release is at the discretion of the Board of Parole. The Board of Parole can also impose certain conditions for your release.[72]

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 where you would have to finish out your full sentence as if you had never been released.[73]

---

[64] 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)(d)(i) (McKinney 2014).

[65] N.Y. CORRECT. LAW § 803(1)(d)(iii) (McKinney 2014).

[66] N.Y. CORRECT. LAW § 803(1)(d)(v) (McKinney 2014).

[67] N.Y. CORRECT. LAW § 803(1)(d)(iii) (McKinney 2014).

[68] N.Y. CORRECT. LAW § 803(1)(d)(iv) (McKinney 2014).

[69] N.Y. CORRECT. LAW § 803(1)(d)(iv) (McKinney 2014).

[70] N.Y. C.P.L.R. § 8303-a(c) (McKinney 1981).

[71] N.Y. PENAL LAW § 70.40(2) (McKinney 2022).

[72] N.Y. PENAL LAW § 70.40(2) (McKinney 2021).

[73] N.Y. PENAL LAW § 70.40(2) (McKinney 2021).

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.[74] 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.[75] 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.[76] 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.

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

In 1998, the New York state legislature passed Jenna's Law.[77] This law imposes a period of mandatory post-release supervision for all incarcerated people 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.[78] Those serving determinate sentences are subject to mandatory post-release supervision.[79]

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

---

[74] N.Y. PENAL LAW § 70.40(1)(b) (McKinney 2021).

[75] N.Y. PENAL LAW § 70.40(1)(b) (McKinney 2021).

[76] *See, e.g.*, People *ex rel.* Travis v. Coombe, 219 A.D.2d 881, 881–882, 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 (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).

[77] Jenna's Law is named after Jenna Grieshaber, 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*, N.Y. St. BAR ASS'N .J., Feb. 2009, at 28, 28.

[78] *See, e.g.,* N.Y. PENAL LAW § 70.70(2)(a), (3)(b), (4)(b) (McKinney 2021); N.Y. PENAL LAW § 70.71(2)(b), (3)(b), (4)(b) (McKinney 2021).

[79] N.Y. PENAL LAW § 70.45(1) (McKinney 2021).

period of post-release supervision for determinate sentences is five years. However, drug offenses and first-time violent felony offenses listed in section (a), "Length of Post-Release Supervision" (see below), may have shorter periods of supervision.[80] The court has the power to set your post-release supervision period anywhere between the minimum and the maximum possible periods under the law.[81] 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:

Felony Drug Offenses		
Class	First Time	Non-first Time
Class D or E	1 year[82]	1–2 years[83]
Class B or C	1–2 years[84]	1 ½–3 years[85]

Violent Felony Offenses	
Class	First or Non-first time
Class D or E	1 ½–3 years[86]
Class B or C	2 ½–5 years[87]

Felony Sex Offenses		
Class	First Time	Non-first Time
Class D or E	3–10 years[88]	5–15 years[89]

[80] N.Y. PENAL LAW § 70.45(2) (McKinney 2021).

[81] *See, e.g.*, N.Y. PENAL LAW § 70.45(2)(b) (McKinney 2021) ("[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[.]").

[82] N.Y. PENAL LAW § 70.45(2)(a) ((McKinney 2021).

[83] N.Y. PENAL LAW § 70.45(2)(c) ((McKinney 2021).

[84] N.Y. PENAL LAW § 70.45(2)(b) ((McKinney 2021).

[85] N.Y. PENAL LAW § 70.45(2)(d) ((McKinney 2021).

[86] N.Y. PENAL LAW § 70.45(2)(e) ((McKinney 2021).

[87] N.Y. PENAL LAW § 70.45(2)(f) ((McKinney 2021).

[88] N.Y. PENAL LAW § 70.45(2-a)(a), (d) (McKinney 2021).

[89] N.Y. PENAL LAW § 70.45(2-a)(g) (McKinney 2021).

Class C	5–15 years[90]	7–20 years[91]
Class B	5–20 years[92]	10–25 years[93]
Child Sexual Assault	10–20 years[94]	

(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.[95] 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.[96]

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.[97] 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 released left when you are accused of violating 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.[98]

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.[99] If the time remaining on your determinate and indeterminate sentences combines to be more than the time left on your supervised release, you may be required to serve the combined time remaining on your sentences instead of the time remaining on your supervised release. For example, if your post-release supervision is revoked with six months left of supervised release, and you have six months left on your determinate sentence and six months left on your indeterminate sentence, then you may be

[90] N.Y. PENAL LAW § 70.45(2-a)(b), (e) (McKinney 2021).

[91] N.Y. PENAL LAW § 70.45(2-a)(h) (McKinney 2021).

[92] N.Y. PENAL LAW § 70.45(2-a)(c), (f) (McKinney 2021).

[93] N.Y. PENAL LAW § 70.45(2-a)(i) (McKinney 2021).

[94] N.Y. PENAL LAW § 70.45(2-a)(j) (McKinney 2021).

[95] N.Y. EXEC. LAW § 259-i(3) (McKinney 2018).

[96] N.Y. PENAL LAW § 70.45(1) (McKinney 2021).

[97] N.Y. PENAL LAW § 70.45(1) (McKinney 2021).

[98] N.Y. PENAL LAW § 70.45(1-a) (McKinney 2021).

[99] N.Y. PENAL LAW § 70.45(1) (McKinney 2021).

sentenced to serve one year (the combination of the time remaining on both of your sentences), instead of six months.

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.[100] 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 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 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.[101] Any amount of time you spent in custody due to a delinquency declaration exceeding your maximum sentence will be credited against your remaining period of post-release supervision.[102]

(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 incarcerated people.

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 incarcerated people 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.[103] In addition, the judge must have imposed or stated the term of post-release supervision *at sentencing*.[104] 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 incarcerated people 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.[105] 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.[106] In addition, the judge must have

---

[100] N.Y. PENAL LAW § 70.45(5)(d) (McKinney 2021).

[101] N.Y. PENAL LAW § 70.45(5)(e), (f) (McKinney 2021).

[102] N.Y. PENAL LAW § 70.45(5)(d) (McKinney 2021).

[103] People v. Sparber, 10 N.Y.3d 457, 468–470, 889 N.E.2d 459, 463, 859 N.Y.S.2d 582, No. 53, slip op. at 7 (2008) (finding that sentencing is a "uniquely judicial responsibility" that can only be imposed by the courts).

[104] People v. Sparber, 10 N.Y.3d 457, 468–470, 889 N.E.2d 459, 463–465, 859 N.Y.S.2d 582, No. 53, slip op. at 7 (2008).

[105] N.Y. PENAL LAW § 70.85 (McKinney 2021).

[106] N.Y. PENAL LAW § 70.85 (McKinney 2021).

imposed or stated the term of post-release supervision *at sentencing*.[107] 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.

In the resentencing process, you have certain rights. DOCS or the Division of Parole must notify you and the sentencing judge that resentencing must take place.[108] Within ten days of receiving the notice, the sentencing judge must appoint counsel for you.[109] Within forty days after the notice, the judge must make a decision and resentence you.[110] Note that you may waive these deadlines.[111]

Even if DOCS imposed post-release supervision on you, a judge may re-sentence you and still impose a term of post-release supervision.[112] 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.[113] If you are incarcerated for these reasons, you are entitled to immediate release.

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."[114] 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.[115]

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.[116] This means that you will be given either a new trial or re-sentencing. If you are re-sentenced,

---

[107] People v. Sparber, 10 N.Y.3d 457, 468–469, 889 N.E.2d 459, 463–465, 859 N.Y.S.2d 582, No. 53, slip op. at 7 (2008).

[108] N.Y. CORRECT. LAW § 601-d(2) (McKinney 2014).

[109] N.Y. CORRECT. LAW § 601-d(4)(a) (McKinney 2014).

[110] *See* N.Y. CORRECT. LAW § 601-d(4)(d) (McKinney 2014).

[111] *See* N.Y. CORRECT. LAW § 601-d(4)(e) (McKinney 2014).

[112] *See* People v. Sparber, 10 N.Y.3d 457, 471, 889 N.E.2d 459, 464, 859 N.Y.S.2d 582, 589 (2008) (finding the procedure through which post-release supervision was imposed did not comply with the statutory mandate, but still remanding to trial court for re-sentencing).

[113] *See* People *ex rel.* Lucas Foote v. Piscotti, 51 A.D.3d 1407, 1408, 857 N.Y.S.2d 515, 515 (4th Dept. 2008) (granting petitioner's writ of habeas corpus contending that DOCS lacked authority to impose a period of post-release supervision after the sentencing court had not done so); People *ex rel.* Gerard v. Kralik, 51 A.D.3d 1045, 1046, 858 N.Y.S.2d 771, 772 (2d Dept. 2008) (holding that "[t]he Division of Parole has no authority to impose a period of post-release supervision, or any other component of a sentence"); *see also* Prendergast v. N.Y. State Dept. of Corr., 51 A.D.3d 1133, 1133–1134, 856 N.Y.S.2d 725, 726 (3d Dept. 2008) (holding that only a court may impose post-release supervision).

[114] People v. Catu, 4 N.Y.3d 242, 245, 825 N.E.2d 1081, 1082, 792 N.Y.S.2d 887, 888 (2005).

[115] People v. Rucker, 67 A.D.3d 1126, 1128, 888 N.Y.S.2d 313, 316 (3d Dept. 2009).

[116] *See* People v. Stewart, 16 N.Y.3d 839, 840–841, 947 N.E.2d 1182, 1182–1183, 923 N.Y.S.2d 404, 404–405 (2011); People v. Louree, 8 N.Y.3d 541, 546, 546 n.* 869 N.E.2d 18, 21–22, 22 n.* 838 N.Y.S.2d 18, 21–22, 22 n.* (2007).

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.[117] During this year, the Board of Parole will supervise you, and you must continue to follow the terms of your conditional release agreement.[118]

If you are conditionally released from an indeterminate sentence, your conditional release will last for the maximum amount of time remaining on your sentence.[119] 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.[120] For more information about parole, see Chapter 32, "Parole," of the *JLM*.

If you are conditionally released 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 Section F(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 received a determinate sentence after being convicted of a felony other than one under N.Y. Penal Law Section 220 or 221 (the sections on marijuana or other controlled substance offenses).[121] This kind of merit termination satisfies all the remaining time on your sentence, as if you had served it all in prison.

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.[122] 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.[123] Examples of such violations

---

[117] *See* N.Y. PENAL LAW § 70.40(2) (McKinney 2021).

[118] *See* N.Y. PENAL LAW § 70.40(2) (McKinney 2021).

[119] *See* N.Y. PENAL LAW § 70.40(1)(b) (McKinney 2021).

[120] *See* N.Y. PENAL LAW § 70.40(1) (McKinney 2021).

[121] *But see* N.Y. EXEC. LAW § 259-j(1) (McKinney 2018) (allowing for a discharge of post-release supervision after three consecutive 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.

[122] *See* Hyser v. Reed, 318 F.2d 225, 234 (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) (McKinney 2021) (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).

[123] *See* N.Y. CORRECT. LAW § 274(1) (McKinney 2014); N.Y. EXEC. LAW § 259-i(3)(a)(i) (McKinney 2018).

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.[124]

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.[125] 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.[126] 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.[127] 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.[128] If probable cause is not found, the case will be dismissed, and you will be released again.[129] If probable cause is found, however, the government must hold a revocation hearing within ninety days.[130] 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.[131]

The Conditional Release Commission or the Board of Parole must provide you with due process before permanently revoking your conditional release.[132] 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.[133] You are also entitled to a lawyer at the revocation hearing.[134] If you are unable to afford a lawyer, the local county court must provide you with a lawyer for the hearing.[135] At the hearing, you will be given the opportunity to make a statement.[136] You also have the right to present evidence and to confront and cross-examine witnesses testifying against

---

[124] *See* N.Y. EXEC. LAW § 259-i(3)(a)(i) (McKinney 2018).

[125] *See* N.Y. EXEC. LAW § 259-i(3)(c)(iii) (McKinney 2018).

[126] *See* N.Y. EXEC. LAW § 259-i(3)(c)(iii) (McKinney 2018).

[127] *See* N.Y. EXEC. LAW § 259-i(3)(c)(iv) (McKinney 2018).

[128] *See* N.Y. EXEC. LAW § 259-i(3)(c)(iv) (McKinney 2018).

[129] *See* N.Y. EXEC. LAW § 259-i(3)(c)(vii) (McKinney 2018).

[130] *See* N.Y. EXEC. LAW § 259-i(3)(f)(i) (McKinney 2018). 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.

[131] *See* N.Y. EXEC. LAW § 259-i(3)(f)(iii) (McKinney 2018).

[132] *See* Morrissey v. Brewer, 408 U.S. 471, 482–484, 92 S. Ct. 2593, 2601–2602, 33 L. Ed. 2d 484, 495–497 (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, 2 Misc. 3d 265, 268, 769 N.Y.S.2d 357, 360 (Sup. Ct. Yates County 2003) (finding incarcerated people 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 (2d Cir. 2000) (finding that an incarcerated person 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, 333–334 (2d Cir. 2006) (finding that incarcerated people 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).

[133] *See* N.Y. CRIM. PROC. LAW §§ 410.70(1)(b), (3) (McKinney 202023); N.Y. EXEC. LAW §§ 259-i(3)(f)(v)–(vi) (entitlement to hearing), (viii)–(ix) (requiring preponderance of evidence) (McKinney 2018).

[134] *See* N.Y. CRIM. PROC. LAW § 410.70(4) (McKinney 2023); N.Y. EXEC. LAW § 259-i(3)(f)(v) (McKinney 2018).

[135] *See* N.Y. EXEC. LAW § 259-i(3)(f)(v) (McKinney 2018).

[136] *See* N.Y. CRIM. PROC. LAW § 410.70(2) (McKinney 2023).

you.[137] 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.[138] 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.[139] If you are released again, the time you spent in detention will be credited against the time you must serve.[140]

7. Disadvantages of Conditional Release for Incarcerated people 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 incarcerated person, 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.[141] 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, incarcerated people often apply for conditional release as soon as they become eligible for it, but the local Conditional Release Commissions often deny these requests until shortly before their sentences end so as keep these incarcerated people 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. But it is important 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 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.[142] 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.

---

[137] *See* N.Y. CRIM. PROC. LAW § 410.70(3) (McKinney 2023); N.Y. EXEC. LAW §§ 259-i(3)(f)(iv)-(vi) (McKinney 2018).

[138] *See* N.Y. CRIM. PROC. LAW §§ 410.70(3), (5) (McKinney 2023); N.Y. EXEC. LAW § 259-i(3)(f)(ix) (McKinney 2018).

[139] *See* N.Y. CRIM. PROC. LAW §§ 410.70(3), (5) (McKinney 20023); N.Y. EXEC. LAW § 259-i(3)(f)(x) (McKinney 2018).

[140] *See* N.Y. EXEC. LAW § 259-i(3)(h) (McKinney 2018).

[141] *See* N.Y. PENAL LAW § 70.40(2) (McKinney 2021).

[142] *See* N.Y. CORRECT. LAW § 804(1) (McKinney 2014).

As soon as you are eligible and request to be released, your sentence will be over—there is no post-release supervision. Accordingly, unlike incarcerated people released on parole or on conditional release, you will not need 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 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.[143] 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 incarcerated people serving indeterminate sentences. That is, presumptive release is intended to be readily available for incarcerated people 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, 2025.[144]

Although you do not have a right to demand presumptive release, you may be eligible if you meet certain requirements.[145] First, the presumptive release program is only available to incarcerated people serving one or more indeterminate sentences. Second, the presumptive release program is only available to incarcerated people serving sentences for non-violent crimes,[146] who have not committed any serious disciplinary infractions,[147] and who have not been deemed to have filed or continued frivolous (that is, not serious) legal complaints.[148]

1. Earned Eligibility Program

To be eligible for presumptive release, you must first receive a "certificate of earned eligibility."[149] Whether you are serving an indeterminate or a determinate sentence, you should have been assigned a work and treatment program.[150] 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.[151] If the commissioner decides you have successfully participated in your program,

---

143 N.Y. CORRECT. LAW § 806 (McKinney 2014). Please note that more information about the presumptive release program is available online. *See* New York State Department of Corrections and Community Supervision Programs, Directive No. 4791, Presumptive Release (2017), *available at* http://www.doccs.ny.gov/Directives/4791.pdf, (last visited Oct. 5, 2023).

144 This law is scheduled to expire on September 1, 2025. 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, Directive No. 4791, Presumptive Release (2017), *available at* http://www.doccs.ny.gov/Directives/4791.pdf, (last visited Feb. 7, 2024).

145 *See* N.Y. CORRECT. LAW § 806(5) (McKinney 2014).

146 Under New York State law, an incarcerated person 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 2014).

147 *See* N.Y. CORRECT. LAW § 806(1)(ii) (McKinney 2014).

148 *See* N.Y. CORRECT. LAW § 806(1)(iii) (McKinney 2014).

149 *See* N.Y. CORRECT. LAW § 806(1) (McKinney 2014).

150 *See* N.Y. CORRECT. LAW § 805 (McKinney 2014).

151 *See* N.Y. CORRECT. LAW § 805 (McKinney 2014).

he may issue you a certificate of earned eligibility.[152] 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,[153] (2) not have been convicted of a violent offense,[154] (3) not have committed any serious disciplinary violations while in prison, and (4) not have filed any frivolous lawsuits.[155] 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).[156]

The conditions of presumptive release are very similar to the conditions of parole or conditional release.[157] 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.[158]

There are several different types of clemency: pardon, amnesty, reprieve, pardon, and commutation. A pardon attempts to clear a person's name of a crime and restore their reputation. Amnesty refers to an official pardon for people who have been convicted of political offenses. A reprieve postpones a scheduled execution. Finally, a commutation either fully or partially reduces the current sentence being served.[159]

All forms of clemency are generally difficult to obtain. However, you may have a stronger chance at clemency if you are a non-violent offender or a woman who is in jail for killing an abusive partner. This Part focuses on clemency for battered women.[160] If you are not a battered woman and are still

---

[152] *See* N.Y. CORRECT. LAW § 805 (McKinney 2014).

[153] *See* N.Y. CORRECT. LAW § 805 (McKinney 2014).

[154] Under New York state law, an incarcerated person 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 2014).

[155] *See* N.Y. CORRECT. LAW § 806(1)(iii) (McKinney 2014).

[156] *See* N.Y. CORRECT. LAW §§ 806(1)–(2) (McKinney 2014).

[157] *See* N.Y. PENAL LAW § 70.40(1)(c) (McKinney 2021). Note that this law is scheduled to be repealed on September 1, 2025, and after this date, you must check for the new, updated version of this law.

[158] State of New York, Department of Corrections and Community Supervision, Executive Clemency, *available at* https://www.ny.gov/services/apply-clemency (last visited Oct. 6, 2023). 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. Florida Rules of Executive Clemency, R. 4, *available at* https://www.fcor.state.fl.us/docs/clemency/clemency_rules.pdf (last visited Oct. 6, 2023).

[159] The Mich. Women's Clemency and Justice Project, Clemency for Battered Women in Michigan: A Manual for Attorneys, Law Students and Social Workers, Chapter II-A, "Clemency Defined," *available at* http://umich.edu/~clemency/clemency_mnl/printable.html (last visited Oct. 6, 2023).

[160] For further information on clemency for battered women nationwide, contact the National Women Defense

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.[161] 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.[162]

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 United States.[163] 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 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.[164]

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

---

Center for Criminalized Survivors, 540 Fairview Ave N Suite 208, St. Paul, MN 55104, (800) 903-0111 extension 3 (toll free).

[161] Federal law authorizes the courts in some instances to appoint lawyers for incarcerated people in capital cases facing death sentences who cannot afford lawyers. *See* 18 U.S.C. § 3599. In *Harbison v. Bell*, the Supreme Court held that the statute gives federal courts the power to appoint counsel to incarcerated people serving their sentences in federal and state prisons who cannot afford lawyers and who seek counsel in federal or state clemency proceedings. Harbison v. Bell, 556 U.S. 180, 185–186, 129 S. Ct. 1481, 1486, 173 L. Ed. 2d 347, 355 (2009).

[162] State of New York, Department of Corrections and Community Supervision, Community Supervision Handbook: Questions and Answers Concerning Release and Community Supervision § 8 (2019), *available at* https://doccs.ny.gov/system/files/documents/2019/05/Community_Supervion_Handbook.pdf (last visited Oct. 6, 2023).

[163] State of New York, Department of Corrections and Community Supervision, Executive Clemency, *available at* https://www.ny.gov/services/apply-clemency (last visited Oct. 6, 2023).

[164] State of New York, Department of Corrections and Community Supervision, Executive Clemency, *available at* https://www.ny.gov/services/apply-clemency (last visited Oct. 6, 2023).

(3) "[F]urther incarceration would constitute gross unfairness because of the basic inequities involved."[165]

3. How to Request a Pardon or Commutation

To be considered for clemency in New York, you will need to send a completed application or a written request for clemency to of the following address:

New York State
Department of Corrections and Community Supervision
Executive Clemency Bureau
The Harriman State Campus – Building 4
1220 Washington Ave
Albany, NY 12226-2050

If you can, scan and email your application package to: PardonsAndCommutations@doccs.ny.gov.

The Executive Clemency Bureau will receive your application and begin the review process by gathering the necessary information before sending your completed application to the Governor's Office. After receiving a petition requesting clemency, the Governor will review the information and make a decision.[166] The Governor generally grants a formal hearing to incarcerated people seeking commutation of a death sentence. 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.[167]

(a) Organization of Your Petition

To apply for clemency in New York, you will need to fill out a commutation application[168] or a pardon application.[169] There is a separate application if your conviction was for a non-violent offense committed before the age of 16 or 17.[170] If you are unable to obtain an application, you can also submit your own written request for clemency which will serve as your application.

In your application, you should explain the strongest reason(s) why you deserve a pardon or commutation. For example, you could include special circumstances about your 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. Emphasize how you have spent your time in prison in order to show 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).[171]

---

165 Criminal Justice Policy Foundation, New York Executive Clemency Fact Page, *available at* http://www.cjpf.org/clemency-ny (last visited Oct. 8, 2023).

166 State of New York, Department of Corrections and Community Supervision, Executive Clemency, *available at* https://www.ny.gov/services/apply-clemency (last visited Oct. 6, 2023).

167 Criminal Justice Policy Foundation, New York Executive Clemency Fact Page, http://www.cjpf.org/clemency-ny (last visited Oct. 8, 2023).

168 State of New York, Department of Corrections and Community Supervision, Application for Commutation of Sentence (last updated Jun. 2023).

169 State of New York, Department of Corrections and Community Supervision, Application for Pardon (last updated Jun. 2023).

170 State of New York, Department of Corrections and Community Supervision, Background Information Form for Applicants Who Committed an Eligible Non-Violent Crim at Age 16 or 17.

171 The Mich. Women's Clemency and Justice Project, Clemency for Battered Women in Michigan: A Manual

(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.[172] 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 have 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.. You will want to obtain your DOCCS records (records pertaining to the time you have spent in prison), your parole file, your case file, your criminal record, documentation of past abuse or diminished capacity (if applicable), and affidavits or letters of support.

You have a right to some of these records under different freedom of information statutes. 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

(i) *Your DOCCS Records*

The clemency application will ask you about how you spent your time in prison. Your DOCCS records will help you do this. These 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,
(8) Correctional supervision history,
(9) Certificates of program completion, and
(10) Recognition letters.

for Attorneys, Law Students and Social Workers, Chapter VII, "Tips on Submitting Effective Clemency Petitions," *available at* http://umich.edu/~clemency/clemency_mnl/printable.html (last visited Oct. 8, 2023).

[172] For more information, see *JLM*, Chapter 7, "Freedom of Information."

You have a right to this information under FOIA and New York's Personal Privacy Protection Law (PPPL),[173] 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, DOCCS 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.

(ii) *Your Case and Parole Records*

The clemency application will ask for the details of the conviction(s) you are seeking clemency for and about any time you spent on probation or parole. Your case records and your parole records will help you do this.

You also have a right to your case record and parole file under FOIL and PPPL. The parole 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
1220 Washington Avenue
Albany, NY 12226

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

Your case record 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.

You also have a right to obtain pre-sentencing reports, though you may be asked to show a factual need for the reports.[174] To get them, send a written request addressed "To Whom It May Concern" to

---

[173] N.Y. PUB. OFF. LAW §§ 94–95 (McKinney 2021).

[174] N.Y. CRIM. PROC. LAW § 390.50(2)(a) (McKinney 2018); *see* Gutkaiss v. People, 49 A.D.3d 979, 979–980, 853 N.Y.S.2d 677, 678 (3d Dept. 2008) (reversing a denial of disclosing a pre-sentence report because an upcoming hearing for the parole board was a sufficient "factual showing" by the incarcerated person); *see also* In re Blanche

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.

(iii) *Your Criminal Record*

The clemency application will also ask you about other past arrests and convictions that you are not requesting clemency for. To get your criminal record in the state of New York, send a request to:

Record Review Unit
New York State Division of Criminal Justice Services
Alfred E. Smith State Office Building
80 South Swan St
Albany, NY 12210.

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 for 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.

If you have a criminal record outside of New York (arrests or convictions in federal court or in another state), you should try to include information about these as well.

(iv) *Documentation of Past Abuse or Diminished Capacity*

If you suffered from past abuse or diminished capacity that could help explain your actions at the time of your offense, these can also be helpful to include. "Diminished capacity" means an unbalanced mental state that would make you less accountable for your actions. Documentation of past abuse or diminished capacity can 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.

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.

(v) *Affidavits or Letters of Support*

You should also include affidavits and letters of support in your petition. You can ask family members, friends, coworkers, 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.

---

v. People, 193 A.D.2d 991, 991–992, 598 N.Y.S.2d 102 (3d Dept. 1993) (stating that because there was no "factual showing" or statutory authority cited by the incarcerated person, the sentencing court was allowed to deny the request for a pre-sentence report).

J. Compassionate Release for Persons with Terminal Diseases

Forty-nine states and the District of Columbia have programs that allow for the release of dying or seriously ill incarcerated people.[175] For example, California has a compassionate release procedure that allows the court to re-sentence the incarcerated individual or recall their sentence.[176] You must have a serious and advanced illness with an end-of-life trajectory 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.[177] 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.[178]

Each state's rules are different, and many states have recently implemented new programs or are considering new legislation on this issue. For example, the California release program described above was introduced in 2023. 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 incarcerated people through medical parole.[179] To be eligible, you must have a terminal health condition or a significant and permanent non-terminal condition.[180] You must also be 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.[181] In addition, the Commissioner of DOCCS (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-degree murder or conspiracy to commit first-degree murder. If you are serving a sentence for second-degree murder, first-degree manslaughter, any sex offense (defined by Article 130 of the New York Penal Law), or an attempt to commit any of these crimes, you are only eligible if you have served at least half of the minimum period of an indeterminate sentence (sentence with a range of years) or at least half of a determinate sentence (sentence with a defined release date).[182] For example, if you

---

[175] Chris Feliciano Arnold, *The Dying American Prisoner*, THE ATLANTIC (Dec. 23, 2019), *available at* https://www.theatlantic.com/politics/archive/2019/12/compassionate-release-lets-prisoners-die-free/603988/ (last visited Feb. 25, 2024) ("Over time, 49 states and the District of Columbia adopted ['compassionate release'] policies").

[176] CAL. PENAL CODE § 1170(e) (LexisNexis 2023).

[177] CAL. PENAL CODE § 1172.2(b) (LexisNexis 2023).

[178] CAL. PENAL CODE § 11172.2(g) (LexisNexis 2023).

[179] N.Y. EXEC. LAW § 259-r (McKinney 2018). *See also* N.Y. STATE DEP'T OF CORRECT. AND CMTY. SUPERVISION, COMMUNITY SUPERVISION HANDBOOK: QUESTIONS AND ANSWERS CONCERNING RELEASE AND COMMUNITY SUPERVISION § 6(G) (2019), *available at* https://doccs.ny.gov/system/files/documents/2019/05/Community_Supervision_Handbook.pdf (last visited Oct. 8, 2023); N.Y. STATE DEP'T OF CORRECT. AND CMTY. SUPERVISION, DIRECTIVE NO. 4304: MEDICAL PAROLE AND COMPASSIONATE RELEASE (2023), *available at* http://www.doccs.ny.gov/Directives/4304.pdf (last visited Feb. 25, 2024)

[180] *See* N.Y. STATE DEP'T OF CORRECT. AND CMTY. SUPERVISION, DIRECTIVE NO. 4304: MEDICAL PAROLE AND COMPASSIONATE RELEASE (2023), *available at* http://www.doccs.ny.gov/Directives/4304.pdf (last visited Feb. 25, 2024).

[181] N.Y. STATE DEP'T OF CORRECT. AND CMTY. SUPERVISION, DIRECTIVE NO. 4304: MEDICAL PAROLE AND COMPASSIONATE RELEASE (2023), *available at* http://www.doccs.ny.gov/Directives/4304.pdf (last visited Feb. 25, 2024).

[182] *See* N.Y. STATE DEP'T OF CORRECT. AND CMTY. SUPERVISION, DIRECTIVE NO. 4304: MEDICAL PAROLE AND

are serving an indeterminate sentence of 5 to 10 years, you would need to serve 2.5 years before becoming eligible for medical parole.

The New York medical parole process has three steps. First, you need a physician's certification to start the process.[183] To get this, you or someone acting on your behalf must make a request to the Commissioner of DOCCS or the Division of Health Services that you be considered for medical parole.[184] If you are eligible, the Commissioner has discretion to order a medical evaluation and discharge (release) plan. A physician employed by DOCCS, or by a medical facility used by DOCCS, 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.[185]

The second step begins when the medical evaluation report plan is sent to the commissioner or commissioner's designee, who will advise the Commissioner whether you meet the criteria for medical parole. The Commissioner's designee 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."[186] If the Commissioner decides that you meet the conditions 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 applications for institutional placement. If it appears that you need Public Assistance, an application will be sent to the Department of Social Services.[187]

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. However, getting through the third phase of formal review by the Board of Parole can be very difficult. 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. They will each have fifteen days to submit comments on your release, and you must wait for this comment period to pass before you can be granted medical parole.[188] Additionally, DOCCS must provide "an appropriate medical discharge plan" to the Board of Parole.[189] The Board must assess

---

COMPASSIONATE RELEASE (2023), *available at* http://www.doccs.ny.gov/Directives/4304.pdf (last visited Feb. 25, 2024); N.Y. EXEC. LAW § 259-r(1)(a) (McKinney 2018). Note that New York Executive Law § 259-r is scheduled to expire on September 1, 2021, and after this date, you must check for the new, updated version of this law.

[183] Physicians in the prison system can also initiate the request for you. *See* N.Y. STATE DEP'T OF CORRECT. AND CMTY. SUPERVISION, DIRECTIVE NO. 4304: MEDICAL PAROLE AND COMPASSIONATE RELEASE (2023), *available at* http://www.doccs.ny.gov/Directives/4304.pdf (last visited Feb. 25, 2024) (stating that someone acting on the incarcerated person's behalf or a department employee may also make the request).

[184] *See* N.Y. STATE DEP'T OF CORRECT. AND CMTY. SUPERVISION, DIRECTIVE NO. 4304: MEDICAL PAROLE AND COMPASSIONATE RELEASE (2023), *available at* http://www.doccs.ny.gov/Directives/4304.pdf (last visited Feb. 25, 2024).

[185] N.Y. STATE DEP'T OF CORRECT. AND CMTY. SUPERVISION, DIRECTIVE NO. 4304: MEDICAL PAROLE AND COMPASSIONATE RELEASE (2023), *available at* http://www.doccs.ny.gov/Directives/4304.pdf (last visited Feb. 25, 2024); N.Y. EXEC. LAW § 259-r(2)(a) (McKinney 2018).

[186] N.Y. EXEC. LAW § 259-r(2)(b) (McKinney 2018).

[187] N.Y. STATE DEP'T OF CORRECT. AND CMTY. SUPERVISION, DIRECTIVE NO. 4304: MEDICAL PAROLE AND COMPASSIONATE RELEASE (2023), *available at* http://www.doccs.ny.gov/Directives/4304.pdf (last visited Feb. 25, 2024).

[188] N.Y. EXEC. LAW § 259-r(1)(c) (McKinney 2018).

[189] N.Y. EXEC. LAW § 259-r(2)(c) (McKinney 2018).

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 medical 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."[190] 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.[191] 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.[192] Each time, you will need to agree to have a medical examination.[193]

K. Federal Sentences

The remainder of this Chapter discusses early release from federal sentences. This Part 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 revoked, terminated, or modified at any time. This could result in your being sentenced to an additional term of imprisonment. Section O of this Chapter explains federal supervised release in more detail.

---

[190] N.Y. EXEC. LAW § 259-r(1)(b) (McKinney 2018).

[191] N.Y. EXEC. LAW § 259-r(4)(b) (McKinney 2018).

[192] N.Y. EXEC. LAW § 259-r(4)(a), (e) (McKinney 2018); *see also* N.Y. STATE DEP'T OF CORRECT. AND CMTY. SUPERVISION, COMMUNITY SUPERVISION HANDBOOK: QUESTIONS AND ANSWERS CONCERNING RELEASE AND COMMUNITY SUPERVISION § 6(G) (2019), *available at* https://doccs.ny.gov/system/files/documents/2019/05/Community_Supervion_Handbook.pdf (last visited Oct. 8, 2023).

[193] N.Y. EXEC. LAW § 259-r(4)(d) (McKinney 2018).

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 of the United States or the BOP, after the district court announces your sentence.[194] 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 trying all other administrative remedies available with the BOP.[195]

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.[196] This does not include time on release, like on bail or under house arrest. The BOP interprets the Supreme Court's ruling to mean that you are also not entitled to any time credit off an additional sentence if your release was a condition of parole, probation or supervised release, regardless of how severe the restrictions were.[197] 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.[198]

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.[199]

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 serve your federal sentence.[200] The time you serve can be reduced even further if you obtain good conduct time credits[201] or early release under the Residential Drug Abuse Program (RDAP).[202]

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 the 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

---

[194] United States v. Wilson, 503 U.S. 329, 333, 112 S. Ct. 1351, 1353–1354, 117 L. Ed. 2d 593, 599 (1992).

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

[196] Reno v. Koray, 515 U.S. 50, 60–61, 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).

[197] FED. BUREAU OF PRISONS, PROGRAM STATEMENT 5880.28, at 1-14H (1997), *available at* http://www.bop.gov/policy/progstat/5880_028.pdf (last visited Oct. 8, 2023).

[198] FED. BUREAU OF PRISONS, PROGRAM STATEMENT 5880.28, at 1-14F (1997), *available at* http://www.bop.gov/policy/progstat/5880_028.pdf (last visited Oct. 8, 2023).

[199] Gross v. Berkbile, No. 7:10-CV-00095-KKC, 2011 U.S. Dist. LEXIS 620, at *7 (E.D. Ky. Jan. 4, 2011) (*unpublished*); Stackpole v. Williamson, No. 3:CV-07-0396, 2007 U.S. Dist. LEXIS 54992, at *6–7 (M.D. Pa. July 30, 2007) (*unpublished*).

[200] 18 U.S.C. § 3585(a).

[201] 18 U.S.C. § 3624(b).

[202] 18 U.S.C. § 3621(e)(2)(B).

offense, provided that the time has not been credited against another sentence.[203] For example, you can include the time you spent in federal custody after arrest on your federal charge.[204] This includes the time spent in federal custody before sentencing, including time spent in state proceedings.[205]

You may also be able to receive credit for a second category of time served: 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.[206]

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.[207] 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 officially order that a federal and state sentence run concurrently. A state court may *suggest* that a federal and state sentence run concurrently, but 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.[208] 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 starting on the date that the federal sentence is announced or imposed by the court.[209] The federal court must specifically state that the federal sentence will run concurrently with your state sentence, or it will automatically run consecutively (one after the other).[210] Only the time that you remained in state prison after the federal sentence was announced 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.[211] This rule

---

[203] 18 U.S.C. § 3585(b).

[204] In *Jonah R. v. Carmona*, the Ninth Circuit applied these provisions to grant juveniles credit for time spent in pre-detention custody. *See* Jonah R. v. Carmona, 446 F.3d 1000, 1010 (9th Cir. 2006).

[205] 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 (last visited Oct. 8, 2023).

[206] FED. BUREAU OF PRISONS, PROGRAM STATEMENT 5880.28, at 1-17 (1997), *available at* http://www.bop.gov/policy/progstat/5880_028.pdf (last visited Oct. 8, 2023).

[207] 18 U.S.C. § 3585(b)(2) (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).

[208] 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, 690–691 (10th Cir. 1991)).

[209] 18 U.S.C. § 3584(a); *see* Carmona v. Williamson, 226 F. App'x 240, 241 (3d Cir. 2007) (*unpublished*) (holding that the time a plaintiff served in state prison before being given his federal sentence could not be credited against the federal sentence).

[210] 18 U.S.C. § 3584(a).

[211] Carmona v. Williamson, 226 F. App'x 240, 241 (3d Cir. 2007) (*unpublished*).

includes time spent in detention related to your trial and prosecution for unrelated federal charges,[212] as well as time served in federal pre-sentence custody that has been credited to your state sentence.[213] A district court 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.[214]

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.[215] 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).[216] 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.[217]

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.[218] A court has held that the BOP's decision to only apply pre-sentence credits to longer non-federal sentences was unreasonable.[219] 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

---

[212] 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).

[213] United States v. Storm, No. 1:01-CR-4 TS 2007, U.S. Dist. LEXIS 57019, at *4 (D. Utah Aug. 2, 2007) (*unpublished*) (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*, United States v. Storm, No. 1:01-CR-4 TS, 2008 U.S. App. LEXIS 13024 (10th Cir. June 16, 2008) (*unpublished*).

[214] 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 incarcerated person has begun serving his sentence. United States v. Wilson, 503 U.S. 329, 334–335, 112 S. Ct. 1351, 1354–1355, 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 incarcerated people credit for time served).

[215] These credits are named after the case *Willis v. United States*. 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 if this time was related to his federal offense where defendant was denied release on bail because of the federal detainer lodged against him).

[216] FED. BUREAU OF PRISONS, PROGRAM STATEMENT 5880.28, at 1-22 (1997), *available at* http://www.bop.gov/policy/progstat/5880_028.pdf (last visited Oct. 8, 2023).

[217] FED. BUREAU OF PRISONS, PROGRAM STATEMENT 5880.28, at 1-22 (1997), *available at* http://www.bop.gov/policy/progstat/5880_028.pdf (last visited Oct. 8, 2023).

[218] 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 (last visited .Oct. 8, 2023).

[219] Kayfez v. Gazele, 993 F.2d 1288, 1290 (7th Cir. 1993).

sentence and then to reduce the federal sentence to match the length of the newly calculated state sentence.[220]

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.[221] Keep in mind, however, that there is no guarantee that your sentence will be reduced: the court may decide to keep your original sentence.[222]

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.[223] If the government files this motion within a year of your sentencing,[224] the judge will consider whether you gave "substantial assistance in investigating or prosecuting another person."[225] But 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:[226]

(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, and 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.[227] 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.[228]

---

[220] 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 (last visited Oct. 8, 2023).

[221] FED. R. CRIM. P. 35(b)(4).

[222] FED. R. CRIM. P. 35(b).

[223] FED. R. CRIM. P. 35(b)(1) & (2).

[224] As used in this rule, "sentencing" means the oral announcement of the sentence. *See* FED. R. CRIM. P. 35(c).

[225] FED. R. CRIM. P. 35(b)(1).

[226] FED. R. CRIM. P. 35(b)(2)(A)–(C).

[227] 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 an incarcerated person eligible for a sentencing reduction for substantial assistance). under Rule 35(b)).

[228] United States v. Ellis, 527 F.3d 203, 207–209 (1st Cir. 2008) (holding that a warden within the BOP was unauthorized to make the motion as the "government" under Rule 35(b)).

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.[229]

(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.[230] Credits are awarded at the BOP's discretion at the end of each year.[231] If you have not followed prison rules, you may receive fewer credits or no credits at all in any given year.[232]

(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 for each year of your sentence served.[233] If you committed your offense on or after September 13, 1994, but before April 26, 1996, your good-time credits will 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.[234]

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.[235] 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.[236] 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.[237] You can change your progress status during the year from unsatisfactory

---

[229] 18 U.S.C. § 3624(b)(1).

[230] 18 U.S.C. § 3624(b)(1).

[231] 18 U.S.C. § 3624(b)(1).

[232] 18 U.S.C. § 3624(b)(1).

[233] 28 C.F.R. § 523.20(b) (2023).

[234] 28 C.F.R. § 523.20(d)(2)(i) (2023).

[235] FED. BUREAU OF PRISONS, PROGRAM STATEMENT 5884.03, at 3 (2006), *available at* http://www.bop.gov/policy/progstat/5884_003.pdf (last visited Oct. 8, 2023).

[236] 28 C.F.R. § 523.20(d)(1) (2023).

[237] 28 C.F.R. § 523.20(d)(2)(ii) (2023).

to satisfactory and become eligible for the full fifty-four credits if you begin making satisfactory progress toward receiving a GED.[238]

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.[239] 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).[240] 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 credits are applied on the first day of the last year of your sentence.[241] Prorated means proportioned for the remaining days you have left to serve in that year by applying the "GCT formula."[242] These credits should be credited to you on the first day of the last year of your sentence.[243] However, your good-time credits are not secure until you are actually released from prison.[244] Therefore, you can lose your good-time credits for the current year and all previous years up until your actual release from prison,[245] 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.[246]

(c) Loss of Good Conduct Time Credit

If you violate prison regulations or bring an unfounded (or "malicious") lawsuit,[247] you may lose unvested good conduct time credit as punishment.[248] Federal statute defines an unfounded claim as a

---

[238] FED. BUREAU OF PRISONS, PROGRAM STATEMENT 5884.03, at 3 (2006), *available at* http://www.bop.gov/policy/progstat/5884_003.pdf (last visited Oct. 8, 2023).

[239] FED. BUREAU OF PRISONS, PROGRAM STATEMENT 5880.28, at 1-78R (1998), *available at* http://www.bop.gov/policy/progstat/5880_028.pdf (last visited Oct. 8, 2023).

[240] FED. BUREAU OF PRISONS, PROGRAM STATEMENT 5880.28, at 1-78R (1998), *available at* http://www.bop.gov/policy/progstat/5880_028.pdf (last visited Oct. 8, 2023).

[241] 18 U.S.C. § 3624(b)(1).

[242] FED. BUREAU OF PRISONS, PROGRAM STATEMENT 5880.28, at 1-44–1-44A (1997), *available at* http://www.bop.gov/policy/progstat/5880_028.pdf (last visited Oct. 8, 2023). 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 1-44–1-49 (1997), *available at* http://www.bop.gov/policy/progstat/5880_028.pdf (last visited Oct. 8, 2023). 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), *available at* http://www.bop.gov/policy/progstat/5880_028.pdf (last visited Oct. 8, 2023).

[243] 18 U.S.C. § 3624(b)(1).

[244] FED. BUREAU OF PRISONS, PROGRAM STATEMENT 5880.28, at 1-78S (1998), *available at* http://www.bop.gov/policy/progstat/5880_028.pdf (last visited Oct. 8, 2023).

[245] FED. BUREAU OF PRISONS, PROGRAM STATEMENT 5880.28, at 1-78S (1998), *available at* http://www.bop.gov/policy/progstat/5880_028.pdf (last visited Oct. 8, 2023).

[246] *See* Prison Litigation Reform Act of 1996, PUB. L. NO. 104-134, § 809, 110 STAT. 1321 (1996); 28 U.S.C. § 1932.

[247] 28 U.S.C. § 1932.

[248] 28 U.S.C. § 1932.

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 incarcerated person testifies falsely or otherwise knowingly presents false evidence or information to the court.[249] 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.[250]

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.[251] A staff member will then investigate the incident.[252] At the beginning of the investigation, you should be given a copy of the Incident Report.[253] 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.[254]

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.[255] You generally have a right to be present at the UDC's hearing unless your presence would threaten the prison's security.[256] You also have the right to present evidence and make a statement on your own behalf at this hearing.[257] 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

---

[249] 28 U.S.C. § 1932.

[250] 28 C.F.R. § 541.4(b) (2023); *see also* 28 C.F.R. § 541.3 (2023) (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 (2023).

[251] 28 C.F.R. § 541.5(a) (2023); FED. BUREAU OF PRISONS, PROGRAM STATEMENT 5270.09, at 17 (2011), *available at* http://www.bop.gov/policy/progstat/5270_009.pdf (last visited Oct. 8, 2023). 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 resolve 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) (2023).

[252] 28 C.F.R. § 541.5(b) (2023).

[253] 28 C.F.R. § 541.5(a) (2023).

[254] 28 C.F.R. § 541.5(b)(1)(B) (2023).

[255] 28 C.F.R. § 541.7(c) (2023).

[256] 28 C.F.R. § 541.7(d) (2023).

[257] 28 C.F.R. § 541.7(e) (2023).

for further review.[258] The UDC's decision must be based on "some evidence"[259] that you either did or did not break the rule. You should receive a written copy of the UDC's decision following its review of the incident report.[260]

The DHO can take away your good-time credits if you commit a prohibited act.[261] Prohibited acts include, killing, rioting, taking hostages, etc..[262] At least twenty-four hours before your hearing in front of the DHO, you will receive written notice of the charges against you.[263] If your case is referred to the DHO, you have the option of selecting a staff member to represent you at the DHO hearing.[264] 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).[265] You and your witnesses can present documents and make statements to prove that you did not break the rules.[266] 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.[267]

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.[268]

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.[269] 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.[270] 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.[271]

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

---

[258] 28 C.F.R. § 541.7(a) (2023).

[259] Luna v. Pico, 356 F.3d 481, 487–488 (2d Cir. 2004) (quoting Superintendent v. Hill, 472 U.S. 445, 454, 105 S. Ct. 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)).

[260] 28 C.F.R. § 541.7(h) (2023)

[261] 28 C.F.R. § 541.8(g) (2023); 28 C.F.R. § 541.3, tbl. 1 (2023).

[262] 28 C.F.R. § 541.8(g) (2023); 28 C.F.R. § 541.3, tbl. 1 (2023).

[263] 28 C.F.R. § 541.8(c) (2023).

[264] 28 C.F.R. § 541.8(d) (2022).

[265] 28 C.F.R. § 541.8(d)(1) (2022).

[266] 28 C.F.R. § 541.8(f) (2022). 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) (2022).

[267] 28 C.F.R. § 541.8(f) (2022).

[268] 28 C.F.R. § 541.8(h) (2022).

[269] 28 C.F.R. § 541.3 (2022).

[270] 28 C.F.R. § 541.3 (2022). See Table 1 for a list of offenses by category.

[271] 28 C.F.R. § 541.3(2022).

Law Enforcement Act (VCCLEA) of 1994, then the amount of good-time credit you can lose in a disciplinary hearing is described below.[272]

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.[273] 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.[274] 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.[275] 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.[276]

Type of Offense	Minimum Credits Deducted by DHO[277]
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

[272] 28 C.F.R. § 541.4 (2022). Please note that other types of incarcerated people 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.

[273] FED. BUREAU OF PRISONS, PROGRAM STATEMENT 5270.09: INMATE DISCIPLINE PROGRAM, at 11 (2011), *available at* http://www.bop.gov/policy/progstat/5270_009.pdf (last visited Oct. 11, 2023).

[274] FED. BUREAU OF PRISONS, PROGRAM STATEMENT 5270.09: INMATE DISCIPLINE PROGRAM, at 11 (2011), *available at* http://www.bop.gov/policy/progstat/5270_009.pdf (last visited Oct. 11, 2023).

[275] FED. BUREAU OF PRISONS, PROGRAM STATEMENT 5270.09: INMATE DISCIPLINE PROGRAM, at 12 (2011), *available at* http://www.bop.gov/policy/progstat/5270_009.pdf (last visited Oct. 11, 2023).

[276] FED. BUREAU OF PRISONS, PROGRAM STATEMENT 5270.09: INMATE DISCIPLINE PROGRAM, at 12 (2011), *available at* http://www.bop.gov/policy/progstat/5270_009.pdf (last visited Oct. 11, 2023).

[277] FED. BUREAU OF PRISONS, PROGRAM STATEMENT 5270.09: INMATE DISCIPLINE PROGRAM, at 11-12 (2011), *available at* http://www.bop.gov/policy/progstat/5270_009.pdf (last visited Oct. 11, 2023).

(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.[278] The BOP must follow certain procedures in order to take your credits without violating your due process rights.[279] 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.[280] 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,[281] as required under the Prison Litigation Reform Act (PLRA). You should also read *JLM*, Chapter 14, "The Prison Litigation Reform Act," to learn about PLRA requirements and consequences.

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.[282] 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.[283] 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.[284] The form can be obtained from the staff at Community Corrections Centers or from institution staff (usually the correctional counselor).[285] The Regional Director should respond to your appeal within thirty days of receiving it.[286]

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

---

[278] Henson v. U.S. Bureau of Prisons, 213 F.3d 897, 898 (5th Cir. 2000) (recognizing a person incarcerated in federal prison'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).

[279] Wolff v. McDonnell, 418 U.S. 539, 556–557, 94 S. Ct. 2963, 2974–2975, 41 L. Ed. 2d 935, 951–952 (1974). For a full discussion of this case and these issues, see *JLM*, Chapter 18, "Your Rights at Prison Disciplinary Hearings."

[280] 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 person incarcerated in federal prison'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. Balisok, 520 U.S. 641, 117 S. Ct. 1584, 137 L. Ed. 2d 906 (1997)).

[281] "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.

[282] Fed. Bureau of Prisons, Program Statement 1330.17, *Administrative Remedy Program,* at 6–7 (2012), *available at* http://www.bop.gov/policy/progstat/1330_017.pdf (last visited Oct. 11, 2023).

[283] Fed. Bureau of Prisons, Program Statement 1330.17, *Administrative Remedy Program,* at 6–7 (2012), *available at* http://www.bop.gov/policy/progstat/1330_017.pdf (last visited Oct. 11, 2023).

[284] Fed. Bureau of Prisons, Program Statement 1330.17, *Administrative Remedy Program,* at 7 (2012), *available at* http://www.bop.gov/policy/progstat/1330_017.pdf (last visited Oct. 11, 2023).

[285] Fed. Bureau of Prisons, Program Statement 1330.17, *Administrative Remedy Program,* at 5 (2012), *available at* http://www.bop.gov/policy/progstat/1330_017.pdf (last visited Oct. 11, 2023).

[286] Fed. Bureau of Prisons, Program Statement 1330.17, *Administrative Remedy Program,* at 9 (2012), *available at* http://www.bop.gov/policy/progstat/1330_017.pdf (last visited Oct. 11, 2023).

within thirty days of the date the Regional Director signed the response.[287] 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.[288] The General Counsel should provide you with a response to your appeal within forty days of receiving it.[289]

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.[290] 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 for incarcerated people with substance abuse problems.[291] In RDAP, you participate in individual and group activities to learn to overcome your substance abuse problems.[292] RDAP is a 500-hour program that takes place over nine to twelve months in a separate housing facility for RDAP participants.[293]

(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 incarcerated people' 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.[294] If you request admission into an RDAP, the BOP will decide whether you are eligible to participate in the residential portion.

(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.[295] To be eligible, you must also sign an agreement form stating that you understand your responsibilities

---

[287] Fed. Bureau of Prisons, Program Statement 1330.17, *Administrative Remedy Program,* at 6–7 (2012), *available at* http://www.bop.gov/policy/progstat/1330_017.pdf (last visited Oct. 11, 2023).

[288] Fed. Bureau of Prisons, Program Statement 1330.17, *Administrative Remedy Program,* at 7 (2012), *available at* http://www.bop.gov/policy/progstat/1330_017.pdf (last visited Oct. 11, 2023).

[289] Fed. Bureau of Prisons, Program Statement 1330.17, *Administrative Remedy Program,* at 9 (2012), *available at* http://www.bop.gov/policy/progstat/1330_017.pdf (last visited Oct. 11, 2023).

[290] 28 C.F.R. § 550.57 (2022).

[291] Fed. Bureau of Prisons, Substance Abuse Treatment, *available at* http://www.bop.gov/inmates/custody_and_care/substance_abuse_treatment.jsp (last visited Oct. 11, 2023).

[292] Fed. Bureau of Prisons, Substance Abuse Treatment, *available at* http://www.bop.gov/inmates/custody_and_care/substance_abuse_treatment.jsp (last visited Oct. 11, 2023).

[293] 18 U.S.C. § 3621(e)(5)(A); Fed. Bureau of Prisons, Program Statement 5330.11, *Psychology Treatment Programs,* at ch. 2, 8–10 (2009), *available at* http://www.bop.gov/policy/progstat/5330_011.pdf (last visited Nov. 18, 2023).

[294] 28 C.F.R. §§ 550.53(c)–(d) (2022).

[295] 18 U.S.C. § 3621(e)(5)(B)(i) – (ii).

in joining the RDAP.[296] 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 incarcerated people in the program.[297] In general, you can be admitted to RDAP when you are at least 24 months from your release date.[298] Incarcerated people with serious mental impairments that would not allow them to fully participate in the program will not be allowed into RDAP.[299]

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.[300]

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[301] and non-residential drug abuse treatment.[302] Community treatment services ("CTS") are available for incarcerated people with mental illnesses and sex offenders. Community treatment is also available for some incarcerated people 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.[303]

(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,[304] or
  (b) a Washington D.C. offense on or after August 5, 2000; [305]
(2) You were sentenced for committing a non-violent offense;[306]
(3) The BOP categorizes you as having a "verifiable substance use disorder"; and [307]
(4) You successfully completed all stages of a RDAP.[308]

---

[296] 28 C.F.R. § 550.53(b)(2) (2022).

[297] 28 C.F.R. § 550.53 (2022).

[298] Fed. Bureau of Prisons, Program Statement No. 5330.11, *Psychology Treatment Programs*, at ch. 2, 11 (2009), *available at* https://www.bop.gov/policy/progstat/5330.11.pdf (last visited Mar. 1, 2020) ("Upon assignment of a RDAP referral by the DAPC, the DTS will review an inmate's Central File and other collateral sources of documentation to determine if there is sufficient time remaining on the inmate's sentence, ordinarily 24 months.").

[299] Fed. Bureau of Prisons, Program Statement No. 5330.11, *Psychology Treatment Programs*, at ch. 2, 9 (2009), *available at* https://www.bop.gov/policy/progstat/5330.11.pdf (last visited Sept. 20, 2020).

[300] Fed. Bureau of Prisons, Program Statement No. 5330.11, Psychology Treatment Programs, at ch. 2, 9 (2009), *available at* https://www.bop.gov/policy/progstat/5330.11.pdf (last visited Mar. 1, 2020).

[301] 28 C.F.R. § 550.51 (2022).

[302] 28 C.F.R. § 550.52 (2022).

[303] Fed. Bureau of Prisons, Substance Abuse Treatment, *available at* http://www.bop.gov/inmates/custody_and_care/substance_abuse_treatment.jsp (last visited Oct. 11, 2023); *see also* 28 C.F.R. § 550.56 (2022).

[304] 28 C.F.R. § 550.55(a)(1)(i) (2022).

[305] 28 C.F.R. § 550.55(a)(1)(ii) (2022).

[306] 28 C.F.R. § 550.55(a)(1)(i)–(ii) (2022).

[307] 28 C.F.R. § 550.53(b)(1) (2022).

[308] 28 C.F.R. § 550.55(a)(2) (2022).

Under the second requirement, you are ineligible to receive early release under RDAP if you were sentenced for committing a violent offense.[309] The BOP can look at both the actual crime for which you were sentenced as well as the circumstances surrounding that crime to determine eligibility for RDAP. You are also ineligible for RDAP if you are an Immigration and Customs Enforcement (ICE) detainee, if you are a pretrial detainee, if you are being held in federal prison for a state or military crime, or if you have a prior felony or misdemeanor conviction for homicide, forcible rape, robbery, aggravated assault, arson, kidnapping, or sexual abuse involving a minor, that occurred within 10 years before the date of sentencing for your current conviction.[310] You can also be ineligible at the Director's discretion if you have a current felony conviction for other sorts of offenses.[311] These felony offenses include: a felony that has as an element the actual, attempted, or threatened use of physical force against a person or property; a crime involving the carrying, possession, or use of a firearm, explosive or other dangerous weapon; a crime that presents a serious potential risk of physical force against the person or property of someone else (even if force is not an element of the crime); or a crime involving sexual abuse of children.[312] You may also not receive early release if you have been convicted of an attempt, conspiracy, or solicitation to commit one of the offenses in this paragraph.[313] Finally, you may not receive early release if you have already received early release under 18 U.S.C. § 3621(e).[314]

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.[315] 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; and,

---

[309] Fed. Bureau of Prisons, Program Statement No. 5162.05, *Categorization of Offenses*, at Ch. 3, 8 (2009), *available at* http://www.bop.gov/policy/progstat/5162_005.pdf (last visited Oct. 11, 2023) (listing offenses that are considered violent and will prevent you from participating in RDAP).

[310] 28 C.F.R. § 550.55(b)(1)–(4) (2022).

[311] 28 C.F.R. § 550.55(b)(5) (2022). In *Lopez v. Davis*, the Supreme Court held reasonable the Bureau of Prisons' regulations making certain incarcerated people 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).

[312] 28 C.F.R. § 550.55(b)(5) (2019); *see also* Fed. Bureau of Prisons, Program Statement No. 5162.05, *Categorization of Offenses*, at 8–15 (2009), *available at* http://www.bop.gov/policy/progstat/5162_005.pdf (last visited Feb. 23, 2020) (listing offenses that are included in this category and offenses that may create ineligibility for RDAP at the Director's discretion).

[313] 28 C.F.R. § 550.55(b)(6) (2019).

[314] 28 C.F.R. § 550.55(b)(7) (2019).

[315] Fed. Bureau of Prisons, Program Statement No. 5330.11, *Psychology Treatment Programs*, at Ch. 2, 11–12 (2009), *available at* https://www.bop.gov/policy/progstat/5330.11.pdf (last visited Mar. 1, 2020).

(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.[316]

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.[317] 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.[318] If you do not pass a test for any given subject, you will typically be allowed to take the test only one more time.[319]

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.[320] 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 transitional drug abuse treatment (TDAT).[321] Follow-up services consist of twelve-monthly group sessions of at least one hour.[322]

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.[323]

(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.[324] Your case will be reviewed several times to determine whether you remain eligible for early release under RDAP.[325] Refusal to participate in follow-up treatment is one way you can lose your early release

---

316 Fed. Bureau of Prisons, Program Statement No. 5330.11, *Psychology Treatment Programs*, at Ch. 2, 16 (2009), *available at* https://www.bop.gov/policy/progstat/5330.11.pdf (last visited Mar. 1, 2020).

317 Fed. Bureau of Prisons, Program Statement No. 5330.11, *Psychology Treatment Programs*, at Ch. 2, 16 (2009), *available at* https://www.bop.gov/policy/progstat/5330.11.pdf (last visited Mar. 1, 2020).

318 Fed. Bureau of Prisons, Program Statement No. 5330.11, *Psychology Treatment Programs*, at Ch. 2, 16–17 (2009), *available at* https://www.bop.gov/policy/progstat/5330.11.pdf (last visited Mar. 1, 2020).

319 Fed. Bureau of Prisons, Program Statement No. 5330.11, *Psychology Treatment Programs*, at Ch. 2, 16 (2009), *available at* https://www.bop.gov/policy/progstat/5330.11.pdf (last visited Mar. 1, 2020).

320 28 C.F.R. § 550.53(a)(2) (2019).

321 Fed. Bureau of Prisons, Program Statement No. 5330.11, *Psychology Treatment Programs*, at Ch. 2, 22 (2009), *available at* https://www.bop.gov/policy/progstat/5330.11.pdf (last visited Oct. 13, 2023).

322 Fed. Bureau of Prisons, Program Statement No. 5330.11, *Psychology Treatment Programs*, at Ch. 2, 22 (2009), *available at* https://www.bop.gov/policy/progstat/5330.11.pdf (last visited Oct. 13, 2023).

323 28 C.F.R. § 550.56 (2019). 28 C.F.R. § 550.56 (2023); Fed. Bureau of Prisons, Program Statement No. 5330.11, Psychology Treatment Programs, at Ch. 2, 22 (2009), *available at* https://www.bop.gov/policy/progstat/5330.11.pdf (last visited Mar. 1, 2020).

324 18 U.S.C. § 3621(e)(2)(B); Fed. Bureau of Prisons, First Step Act — Frequently Asked Questions Residential Drug Abuse Treatment Program (RDAP*), available at* https://www.bop.gov/inmates/fsa/faq.jsp#fsa_rdap (last visited Oct. 13, 2023).

325 *See* Fed. Bureau of Prisons, Program Statement No. 5331.02, *Early Release Procedures Under* 18 U.S.C. § 3621(e), 5–6 (2009), *available at* https://www.bop.gov/policy/progstat/5331.02.pdf (last visited Mar. 1, 2020). Your early release can be delayed or removed if the Regional Drug Abuse Treatment Coordinator certifies that

award.[326] While the BOP can reduce your sentence after you successfully complete RDAP, the BOP does not have to do.[327] If you do 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.[328] 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.[329] You can appeal your denial of early release under RDAP using the same procedures explained in the loss of good-time credit section.[330]

(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, fail to participate or attend RDAP activities satisfactorily, or are removed from RDAP by the BOP.[331] 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 incarcerated people in the

---

you have not successfully completed your treatment. *See* Fed. Bureau of Prisons, Program Statement No. 5331.02, *Early Release Procedures Under* 18 U.S.C. § 3621(e), 12 (2009), *available at* https://www.bop.gov/policy/progstat/5331.02.pdf (last visited Oct. 13, 2023).

[326] Fed. Bureau of Prisons, Program Statement No. 5330.11, *Psychology Treatment Programs*, Ch. 2, 22 (2009), *available at* https://www.bop.gov/policy/progstat/5330.11.pdf (last visited Oct. 13, 2023).

[327] *See* Lopez v. Davis, 531 U.S. 230, 241–242, 121 S. Ct. 714, 722, 148 L. Ed. 2d 635, 646–648 (2001) (finding that the BOP has the discretion to not reduce an incarcerated person's term of imprisonment based on his conduct from before his conviction, and even to categorical exclude reductions for incarcerated people with certain types of pre-conviction conduct); *see also* 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 (quoting Lopez v. Davis, 531 U.S. 230, 241–242, 121 S. Ct. 714, 722, 148 L. Ed. 2d 635, 646–648 (2001))).

[328] Fed. Bureau of Prisons, Program Statement No. 5331.02, *Early Release Procedures Under* 18 U.S.C. § 3621(e), 7 (2009), *available at* https://www.bop.gov/policy/progstat/5331.02.pdf (last visited Oct. 13, 2023).

[329] *See* Seacrest v. Gallegos, 2002 U.S. App. LEXIS 1094, at *2–4 (10th Cir. 2002) (*unpublished*) (finding the BOP's decision to change an incarcerated person's status from eligible for early release consideration to ineligible did not violate the *Ex Post Facto* Clause because the decision did not affect the legal definition of the crime or increase the incarcerated person's punishment, and finding that no contractual relationship existed between the incarcerated person and the BOP because his eligibility status had only been provisionally changed to eligible due to a court case that was later determined to be incorrect).

[330] 28 C.F.R. § 550.57 (2023); 28 CFR § 542.15 (2023). *See* Fristoe v. Thompson, 144 F.3d 627, 630 (10th Cir. 1998) (finding that there was no *Ex Post Facto* Clause violation because the legal consequences and the sentence of the incarcerated person's crime remained the same after the change); *see also* Stiver v. Meko, 130 F.3d 574, 578 (3d Cir. 1997) (finding that there was no *Ex Post Facto* Clause violation because the legal consequences of the incarcerated person's crime remained the same).

[331] *See* FED. BUREAU OF PRISONS, PROGRAM STATEMENT NO. 5330.11, PSYCHOLOGY TREATMENT PROGRAMS, at Ch. 2, 17–19 (2009), *available at* https://www.bop.gov/policy/progstat/5330.11.pdf (last visited Oct. 13, 2023). You can be removed from RDAP by BOP for disruptive behavior related to the program or unsatisfactory progress. You will usually be given a formal warning before removal and ordinarily not removed without one treatment intervention session. Treatment intervention includes meeting with staff to create a treatment plan to eliminate the behavior or to improve progress. You will be removed immediately, without formal intervention, if you are found to have committed a prohibited act involving: alcohol or drugs; violence or threats of violence; escape or attempted escape; or any 100-level incident. Some non-violent 100-level incidents include starting a fire or rioting. You can also be removed from the program without intervention if you violate RDAP confidentiality.

program.[332] Also, if you do not follow all of the rules and regulations of RDAP you will be expelled from the program.[333]

If the warden or the drug abuse treatment program coordinator removes you from RDAP, you may request readmission by submitting an "Inmate Request to Staff Form."[334] You have to wait ninety days after your removal from the program to submit the Inmate Request to Staff Form.[335] 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.[336]

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 people incarcerated in federal prisons.[337] This Act authorizes the BOP to grant early release to incarcerated people who meet the following four conditions:[338]

(1) Are sixty or over the age of sixty;
(2) Have never been convicted of a violent crime or sex offense;
(3) Have never escaped or attempted to escape a prison facility; and
(4) Have served two-thirds of their sentence.

Very few incarcerated people will be eligible for early release under this program. The Bureau of Prison estimated that only about 650 federal incarcerated people (or 0.003% of all people incarcerated in federal prison) will meet the requirements.[339] 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.

4. Federal Compassionate Release

If you are incarcerated in the federal system, you might qualify for federal compassionate release. In November 2023, the United States Sentencing Commission made changes to the federal compassionate release policy. These changes clarify some of the requirements that determine who qualifies for compassionate release, which is explained below in Subsection N(4)(a) ("Who Qualifies for Compassionate Release?"). The changes also made it so that some people can now file their own motion for compassionate release, which is explained below in Subsection N(4)(b) ("How Can You Apply for Compassionate Release?").

---

[332] Fed. Bureau of Prisons, Program Statement NO. 5330.11, *Psychology Treatment Programs*, Ch. 2, 17–18 (2009), *available at* https://www.bop.gov/policy/progstat/5330.11.pdf (last visited Oct. 13, 2023).

[333] Fed. Bureau of Prisons, Program Statement No. 5330.11, *Psychology Treatment Programs*, Ch. 2, 17–19 (2009), *available at* https://www.bop.gov/policy/progstat/5330.11.pdf (last visited Oct. 13, 2023).

[334] Fed. Bureau of Prisons, Program Statement No. 5330.11, *Psychology Treatment Programs*, Ch. 2, 19 (2009), *available at* https://www.bop.gov/policy/progstat/5330.11.pdf (last visited Oct. 13, 2023).

[335] Fed. Bureau of Prisons, Program Statement No. 5330.11, *Psychology Treatment Programs,* Ch. 2, 19 (2009), *available at* https://www.bop.gov/policy/progstat/5330.11.pdf (last visited Oct. 13, 2023).

[336] Fed. Bureau of Prisons, Program Statement No. 5330.11, *Psychology Treatment Programs*, Ch. 2, 19 (2009), *available at* https://www.bop.gov/policy/progstat/5330.11.pdf (last visited Oct. 13, 2023).

[337] Second Chance Act of 2007, 110 Pub. L. No. 199, § 231, 122 Stat. 657, 683–690 (2008).

[338] 34 U.S.C. § 60541(g)(5)(A).

[339] Douglas A. Berman, *Another Report from the USSC Alternatives Symposium*, SENTENCING LAW AND POLICY (July 24, 2008), *available at* https://sentencing.typepad.com/sentencing_law_and_policy/2008/07/another-report.html (last visited Mar. 1, 2020).

(a) Who Qualifies for Compassionate Release?

To have your sentence reduced through federal compassionate release, a court must find that you meet three requirements.[340] You should note that the court does not *have* to grant you compassionate release if you meet all three requirements: granting you compassionate release is a decision that the court makes at its own discretion (choice). Instead, these requirements are something that a court must find that you meet before it has the ability to consider granting you compassionate release.

First, the court must determine that one of the following circumstances applies to you:

(1) "Extraordinary and compelling reasons" warrant reducing your sentence; **or**

(2) You:
   (a) are at least 70 years old; **and**
   (b) have served at least 30 years in prison under a sentence imposed under 18 U.S.C. § 3559(c). [341] Section 3559(c) requires a life sentence for people convicted of "a serious violent felony" if they have certain prior convictions.[342]

Note that if you want to argue that you meet the second circumstance, you must meet both the age requirement *and* the 30-year time-served requirement. If this does not apply to you, you should argue that you meet the"extraordinary and compelling reasons" requirement, which is explained in more detail below.

(vi) *Extraordinary and Compelling Reasons*

The United States Sentencing Commission has defined what circumstances can qualify as "extraordinary and compelling reasons."[343] The November 2023 changes clarified existing circumstances and added new circumstances that can be considered extraordinary and compelling reasons. Under the updated policy, there are six provisions that define what can be an extraordinary and compelling reason:[344]

(1) Certain medical circumstances, which includes any of the following situations: [345]
   (a) You have a terminal illness, such as metastatic solid-tumor cancer, end-stage organ disease, or advanced dementia.[346]
   (b) You have a serious medical condition from which you are not expected to recover and that substantially limits your ability to provide self-care within the correctional facility.[347]
   (c) You have a serious "functional or cognitive impairment" from which you are not expected to recover and that substantially limits your ability to provide self-care within the correctional facility.[348]
   (d) You are "experiencing deteriorating physical or mental health because of the aging process" that substantially limits your ability to provide self-care within the correctional facility environment.[349]

---

[340] *See* 18 U.S.C. § 3582(c); U.S. Sent'g Guidelines Manual § 1B1.13(a) (U.S. Sent'g Comm'n 2023).

[341] U.S. Sent'g Guidelines Manual § 1B1.13(a) (U.S. Sent'g Comm'n 2023); 18 U.S.C.A. § 3582(c)(A).

[342] *See* 18 U.S.C. 3559(c).

[343] *See* 28 U.S.C. § 994(t) (stating that the Sentencing Commission has power to describe what should be considered extraordinary and compelling reasons for reducing an incarcerated person's sentence).

[344] U.S. Sent'g Guidelines Manual § 1B1.13(b) (U.S. Sent'g Comm'n 2023).

[345] U.S. Sent'g Guidelines Manual § 1B1.13(b)(1) (U.S. Sent'g Comm'n 2023).

[346] U.S. Sent'g Guidelines Manual § 1B1.13(b)(1)(A) (U.S. Sent'g Comm'n 2023).

[347] U.S. Sent'g Guidelines Manual § 1B1.13(b)(1)(B) (U.S. Sent'g Comm'n 2023).

[348] U.S. Sent'g Guidelines Manual § 1B1.13(b)(1)(B) (U.S. Sent'g Comm'n 2023).

[349] U.S. Sent'g Guidelines Manual § 1B1.13(b)(1)(B) (U.S. Sent'g Comm'n 2023).

(e) You have "a medical condition that requires long-term or specialized medical care" that is not being provided to you and, without that medical care, you are "at risk of serious deterioration in health or death."[350]

(f) Public health situations where **all** of the following three conditions are met: [351]

(i) You are housed at a correctional facility "affected or at imminent risk of being affected by either:

1. an ongoing outbreak of infectious disease, **or**
2. an ongoing public health emergency declared by the appropriate federal, state, or local authority.

(ii) Your "personal health risk factors and custodial status" (which is likely referring to your incarceration and/or your conditions of incarceration) put you at increased risk of severe medical complications or death if exposed to the disease or public health emergency; **and**

(iii) The risk "cannot be adequately" addressed "in a timely manner";

(2) Your age. You must meet **all** of the following three conditions for your age to be an extraordinary and compelling reason:[352]

(a) You are at least 65-years-old;

(b) You are "experiencing a serious deterioration in physical or mental health because of" aging; **and**

(c) You have served at least 10 years or 75 percent of your term of imprisonment (whichever is less);

(3) Certain family circumstances, which includes any of the following situations: [353]

(a) The caregiver of your minor child is no longer able to care for the child because the caregiver died or is incapacitated in some other way.[354]

(b) You have an adult child who is unable to care for themself because of mental disability, physical disability, or a medical condition and their caregiver is no longer able to care for them because the caregiver died or is incapacitated in some other way.[355]

(c) Your spouse or registered partner is incapacitated and you are the only person available who can care for them.[356]

(d) Your parent is incapacitated and you are the only person available who can care for them.[357]

(e) Another immediate family member (child, spouse, registered partner, parent, grandchild, grandparent, or sibling) or someone who is like immediate family to you is incapacitated or lacks a necessary caregiver and you are the only one who can care for them.[358]

(4) You are a victim of abuse. To qualify for this extraordinary and compelling reason, **all** of the following conditions must apply:

---

[350] U.S. Sent'g Guidelines Manual § 1B1.13(b)(1)(C) (U.S. Sent'g Comm'n 2023).

[351] U.S. Sent'g Guidelines Manual § 1B1.13(b)(1)(D) (U.S. Sent'g Comm'n 2023).

[352] U.S. Sent'g Guidelines Manual § 1B1.13(b)(2) (U.S. Sent'g Comm'n 2023).

[353] U.S. Sent'g Guidelines Manual § 1B1.13(b)(3) (U.S. Sent'g Comm'n 2023).

[354] U.S. Sent'g Guidelines Manual § 1B1.13(b)(3)(A) (U.S. Sent'g Comm'n 2023).

[355] U.S. Sent'g Guidelines Manual § 1B1.13(b)(3)(A) (U.S. Sent'g Comm'n 2023).

[356] U.S. Sent'g Guidelines Manual § 1B1.13(b)(3)(B) (U.S. Sent'g Comm'n 2023).

[357] U.S. Sent'g Guidelines Manual § 1B1.13(b)(3)(C) (U.S. Sent'g Comm'n 2023).

[358] U.S. Sent'g Guidelines Manual § 1B1.13(b)(3)(D) (U.S. Sent'g Comm'n 2023).

(a) While you were incarcerated and serving the sentence you are trying to reduce, you were a victim of either sexual abuse **or** other physical abuse that resulted in "serious bodily injury;"[359]

(b) The person who abused you or directed the abuse was a correctional officer, employed by the prison, a contractor of the Bureau of Prisons, or some other person who had "custody or control" over you; **and**

(c) The abuse was proven by a criminal conviction, a civil case (including an admission of liability in such a case), or a finding in an administrative proceeding. You can be excused from this requirement if a proceeding against your abuser was started in either a criminal case, civil case, or prison administrative and those proceedings were "unduly delayed." You can also be excused from this requirement if you are "in imminent danger" because of the abuse you suffered.[360]

(5) Your circumstances are "similar in gravity" to the reasons listed above in items 1 through 4.[361]

(a) Note: The United States Sentencing Commission could not possibly list every extraordinary and compelling reason that might happen. This provision is intended to cover situations that are similar in seriousness or difficulty to the other situations listed above. So, if your situation feels close to any of the ones described above, either because the facts are very close or because it impacts you in a similarly serious way, you should try to argue that your extraordinary and compelling reason is covered by this provision. The facts of your situation do not have to be similar to the above reasons to be "extraordinary and compelling." This provision is about the seriousness of your situation, not its nature or specific consequences.[362]

(6) You received an "unusually long" sentence and have served at least 10 years of that sentence.[363]

(a) When determining whether your sentence is "unusually long," a court may consider whether the law has changed in a way that "produce[s] a gross disparaty" between your sentence and the sentence that would likely "be imposed at the time the motion is filed." For example, this might happen if there was a non-retroactive[364] change in the law that makes it so that, if you had been sentenced today, you would receive a much lower sentence than the sentence you originally received. If so, the court may, after considering your individual circumstnaces, find the change to be an "extraordinary and compelling reason." This unusually long sentence provision is the *only* situation where a non-retroactive change in the law might be considered an extraordinary and compelling reason.[365]

---

[359] "Serious bodily injury" means injury that involved extreme physical pain, long-lasting harm to your body or mental function, or injury that required medical treatment like surgery, hospitalization, or physical rehabilitation. "'Serious bodily injury' also occurs if the offense involved criminal sexual abuse." *See* U.S. Sent'g Guidelines Manual § 1B1.1, cmt 1 (U.S. Sent'g Comm'n 2023).

[360] U.S. Sent'g Guidelines Manual § 1B1.13(b)(4) (U.S. Sent'g Comm'n 2023).

[361] U.S. Sent'g Guidelines Manual § 1B1.13(b)(5) (U.S. Sent'g Comm'n 2023).

[362] U.S. Sent'g Comm'n, *Amendment 814,* https://www.ussc.gov/guidelines/amendment/814 (last visited Mar. 28, 2024) ("The Commission considered but specifically rejected a requirement that "other reasons" be similar in nature and consequence to the specified reasons. Rather, they need be similar only in gravity.").

[363] U.S. Sent'g Guidelines Manual § 1B1.13(b)(6) (U.S. Sent'g Comm'n 2023). *See also* United States v. Rogers, 2024 WL 1116927, at *2 (W.D. La. Mar. 13, 2024) ("The enumerated circumstances that constitute "extraordinary and compelling reasons" for a reduction in sentence include . . . an unusually long sentence.").

[364] "Non-retroactive" means a change in the law that does not apply to anyone that was sentenced before the law was made.

[365] U.S. Sent'g Guidelines Manual § 1B1.13(b)(6), (c) (U.S. Sent'g Comm'n 2023).

(b) Note: You should note that an unusually long sentence might be very difficult to prove as an extraordinaory and compelling reason, especially when it relies on a non-retroactive change in the law. At least one court has found that the unusually long sentence provision is invalid when it is used to consider a non-retroactive change.[366] At the time of the *JLM*s publication (April 2024), no appellate court has addressed this issue. If you plan to argue that you qualify for compassionate release under this provision, you should try to research this issue further to see if there have been any new cases addressing unusually long sentences as an extraordinary and compelling reason for federal compassionate release.[367]

The above is an exhaustive (complete) list of all circumstances that a court can consider to be an extraordinary and compelling reason. You must argue that your circumstance falls into one of the six provisions listed above to qualify for compassionate release if you did not meet the age and time-served requirement.

You should also note that the compassionate release policy makes clear that your rehabilitation can **not** be an extraordinary and compelling reason on its own. [368] However, evidence of your successful rehabilitation *can* be considered by the court when it is deciding whether to grant you compassionate release. Recall that the court is not *required* to grant you compassionate release if you meet all the requirements, the court is simply able to *choose* to grant you compassionate release. So, if you have strong evidence of rehabilitation—for example, you have an exceptional behavioral record or have successfully completed many optional programs while incarcerated—you should include this information in your application because it could help the court decide that you should be granted a sentence reduction.

(vii) *Not a Danger to a Person or the Community*

If you meet either the age and time-served requirement *or* the extraordinary and compelling reasons requirement above, there are still two more requirements you must meet. Second, the court must determine that you are "not a danger to the safety of any other person or to the community."[369]

In determining whether you are a danger to a person or the community, the court will consider the following factors:[370]

(1) The nature and circumstances of the offense you are incarcerated for. This includes looking at whether the offense is any of the following:
   a. A crime of violence;
   b. A sex trafficking crime involving minors or the use of force, fraud, or coercion;
   c. A federal crime of terrorism;
   d. An offense involving a minor victim; or

---

[366] *See* States v. Williams, 2024 WL 1075226 (N.D. Iowa Mar. 12, 2024).

[367] *JLM*, Chapter 2, "Introduction to Legal Research," and Chapter 3, "Your Right to Learn the Law and Go to Court," can help you with your legal research.

[368] U.S. Sent'g Guidelines Manual § 1B1.13(d) (U.S. Sent'g Comm'n 2023).

[369] U.S. Sent'g Guidelines Manual § 1B1.13(a)(2) (U.S. Sent'g Comm'n 2023). If you are looking at the Compassionate Release Statute, you might notice that it does not directly require a determination of non-dangerousness for those seeking compassionate release based on "extraordinary and compelling reasons." 18 U.S.C.A. § 3582(c)(1)(a). However, this requirement is in the United States Sentencing Commission's policy, which the Compassionate Release Statute requires the court to follow, so you should still consider this to be a requirement under the statute. *See* U.S. Sent'g Guidelines Manual § 1B1.13(a)(2) (U.S. Sent'g Comm'n 2023); United States v. Bryant, 996 F.3d 1243, 1255 (11th Cir. 2021) (Congress "made [the policy statement] binding on courts by providing that a sentence may be reduced . . . only where doing so is consistent with the Commission's policy statements." (quoting United States v. Colon, 707 F.3d 1255, 1259 (11th Cir. 2013)).

[370] *See* U.S. Sent'g Guidelines Manual § 1B1.13(a)(2) (U.S. Sent'g Comm'n 2023) (defining danger to a person or the community "as provided in 18 U.S.C. § 3142(g)"); 18 U.S.C. § 3142(g).

e. An offense involving a controlled substance (drugs), a firearm, an explosive, or a destructive device.

(2) The weight of the evidence against you.

(3) Your history and personal characteristics, which include:

a. Your character, physical and mental condition, family ties, employment, financial resources, length of residence in the community you would be released in, your past conduct, your drug and alcohol history, your criminal history, and your record of appearing at past court proceedings.

b. Whether you were on probation, parole, or some other form of temporary release (like being out on bail) at the time you committed the offense you are currently incarcerated for.

(4) The "nature and seriousness of the danger" that would be posed to any person or the community if you were released.

The last factor is very vague and will allow the court to make its own judgment as to whether you would pose some sort of "danger." For example, someone was denied compassionate release based on this dangerousness requirement because their illness was not life-threatening and they would have been physically able to commit another crime if they were released.[371]

(viii) *Release is Consistent with Policy*

Finally, under the third requirement, the court must determine that reducing your sentence by granting you compassionate release is "consistent" with the United States Sentencing Commission's policy.[372] The court will consider general sentencing factors set out at 18 U.S.C. § 3553(a) in determining whether to grant compassionate release, which include things like the seriousness of the offense you were incarcerated for, the need to deter other people from commiting the offense, the need to protect the public, and the need to provide "just punishment" for the offense. [373]

(b) How Can You Apply for Compassionate Release?

If you think you qualify for compassionate release, you should begin the process to apply. A court can consider a motion for compassionate release either from the Director of the Bureau of Prisons or, under the November 2023 policy change, from you.[374] In order to file your own motion, you must first "exhaust" administrative remedies. This means you should first follow the procedures below to try to get the Director of the Bureau fo Prisons to file a motion on your behalf.

For the Director of the Bureau of Prisons to file the motion on your behalf, you must 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 reasons you think you should get compassionate release.[375] 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.[376]

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.

---

[371] 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).

[372] U.S. Sent'g Guidelines Manual § 1B1.13(a)(3) (U.S. Sent'g Comm'n 2023).

[373] U.S. Sent'g Guidelines Manual § 1B1.13(a) (U.S. Sent'g Comm'n 2023).

[374] 18 U.S.C. § 3582(c)(1)(A); U.S. Sent'g Guidelines Manual § 1B1.13(a) (U.S. Sent'g Comm'n 2023).

[375] Fed. Bureau of Prisons, Program Statement No. 5050.49(2)(a), 3 (2013), *available at* https://www.bop.gov/policy/progstat/5050_049_CN-1.pdf (last visited Oct. 13, 2023); 28 C.F.R. § 571.61 (2023).

[376] Fed. Bureau of Prisons, Program Statement No. 5050.49(2)(a), 3 (2013), *available at* https://www.bop.gov/policy/progstat/5050_049_CN-1.pdf (last visited Oct. 13, 2023); 28 C.F.R. § 571.61 (2023).

If the warden thinks your motion should be granted, he will send it to the Office of General Counsel.[377] 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).[378] 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.[379]

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.[380] The sentencing court will review the Director's motion and decide whether to grant compassionate release. If the sentencing court grants the motion, it will order your release. The warden at your facility will then release you.[381]

You may file a motion for compassionate release yourself if you have already asked your warden for compassionate release and one of two situations apply.[382] First, you have "fully exhausted all administrative rights to appeal" the Bureau of Prisons' failure to file a motion on your behalf. The Subsection below, N(4)(c) ("Denial"), describes the appeal process. Second, it has been 30 days since the warden of your facility received your request for the Bureau to file a motion for compassionate release on your behalf and no action has been taken. You can file your own motion if *either* of these two situations apply—you do not need both.[383]

(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 the warden denies your request for compassionate relief, you can appeal the decision.[384] If the General Counsel or the BOP Director deny your motion, however, that decision is a *final* administrative decision and cannot be appealed.[385]

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.[386] 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

---

[377] Fed. Bureau of Prisons, Program Statement No. 5050.49(8)(a), 11-12 (2013), *available at* https://www.bop.gov/policy/progstat/5050_049_CN-1.pdf (last visited Oct. 13, 2023); 28 C.F.R. § 571.62(a)(1) (2023).

[378] Fed. Bureau of Prisons, Program Statement No. 5050.49(8)(a)(2), 12 (2013), *available at* https://www.bop.gov/policy/progstat/5050_049_CN-1.pdf (last visited Oct. 13, 2023); 28 C.F.R. § 571.62(a)(32) (2023).

[379] Fed. Bureau of Prisons, Program Statement No. 5050.49(8)(a)(2), 12 (2013), *available at* https://www.bop.gov/policy/progstat/5050_049_CN-1.pdf (last visited Oct. 13, 2023); 28 C.F.R. § 571.62(a)(32) (2023).

[380] Fed. Bureau of Prisons, Program Statement No. 5050.49(8)(a)(3), 12 (2013), *available at* https://www.bop.gov/policy/progstat/5050_049_CN-1.pdf (last visited Oct. 13, 2023); 28 C.F.R. § 571.62(a)(3) (2023).

[381] Fed. Bureau of Prisons, Program Statement No. 5050.49(8)(b), 13 (2013), *available at* https://www.bop.gov/policy/progstat/5050_049_CN-1.pdf (last visited Oct. 13, 2023); 28 C.F.R. § 571.62(b) (2023).

[382] 18 U.S.C. § 3582(c)(1)(A).

[383] 18 U.S.C. § 3582(c)(1)(A) (You may apply if either of the conditions are met, "whichever is earlier.").

[384] Fed. Bureau of Prisons, Program Statement No. 5050.49(9)(a), 13 (2013), *available at* https://www.bop.gov/policy/progstat/5050_049_CN-1.pdf (last visited Oct. 13, 2023); 28 C.F.R. § 571.63(a) (2023).

[385] Fed. Bureau of Prisons, Program Statement No. 5050.49(9)(d), 13 (2013), *available at* https://www.bop.gov/policy/progstat/5050_049_CN-1.pdf (last visited Oct. 13, 2023); 28 C.F.R. §§ 571.63(b)–(d) (2023).

[386] *See JLM*, Chapter 14, "The Prison Litigation Reform Act."

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.[387] It is important to point out, however, that it is unlikely that the court will grant 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.[388] Some courts of appeals have reached similar decisions by denying review of the BOP's refusal to bring a motion on behalf of incarcerated people under 18 U.S.C. § 4205(g) (the other statute covered by the BOP policy statements on early release).[389] 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.[390]

---

[387] *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 an incarcerated person of the requirement of exhaustion of administrative remedies).

[388] *See* United States v. Morales, 353 F. Supp. 2d 204, 205 (D. Mass. 2005) (dismissing habeas corpus petition by terminally ill incarcerated person 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) (*unpublished*) (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) (*unpublished*) (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) (*unpublished*) (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).

[389] *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.1990) (finding that "the Parole and Reorganization Act precludes the federal courts from reviewing the Bureau of Prisons decisions whether to move a sentencing court for the reduction of a minimum term to time served under 18 U.S.C. § 4205(g)); 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).

[390] 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 incarcerated people 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 an incarcerated person 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 incarcerated person's condition at the time of sentencing and its interpretation of "extraordinary and compelling" was limited to terminally-ill incarcerated people who could not complete their sentence). In *Dewalt*, the court did not consider the other group of incarcerated people 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) (*unpublished*).

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.[391]

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 to discourage you from committing crimes again; 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 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.[392]

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 a misdemeanor (other than a petty offense), the maximum length is one year.[393]

Your period of supervised release starts on the day that you are released from prison.[394] The time will run at the same time as any other Federal, State, or local period of supervised release, probation, or parole you may be subjected to for another offense.[395] 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.[396]

2. 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.[397]

The following conditions *must* be included as part of your supervised release:[398]

(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;

---

[391] 18 U.S.C. § 3583(a).

[392] 18 U.S.C. § 3553(a)(1), (2)(B)–(D), (4)–(7).

[393] 18 U.S.C. § 3583(b).

[394] 18 U.S.C. § 3624(e).

[395] 18 U.S.C. § 3624(e).

[396] 18 U.S.C. § 3624(e).

[397] 18 U.S.C. § 3583(f).

[398] 18 U.S.C. § 3583(d).

(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.[399]

The following conditions *can* be included as part of your supervised release:[400]
(1) If you are a sex offender, searches may be done at any time 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.[401]

3. What Happens If You Violate a Condition of Supervised Release?

If you violate any of the conditions set out in your sentence, your supervised release can be revoked. 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; if you refuse to comply with the drug testing requirements, or if as a part of drug testing, test positive for illegal controlled substance more than three times in one year.[402] 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 it was revoked.[403] The court may also order you to serve another term of supervised release in addition to your new term of imprisonment.[404] 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.[405] 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.[406] You may participate in up to two stages of hearings before your supervised release can be taken away. When you are accused of violating the terms of your supervised release, you will be brought to the magistrate who must:

(1) tell you which violation of supervised release you are being charged with, and

---

399 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).

400 18 U.S.C. § 3583(d).

401 18 U.S.C. § 3583(d)(1)–(3). 18 U.S.C. § 3583(d)(3) states that additional conditions must be "consistent with any pertinent policy statements issued by the Sentencing Commission." See 18 U.S.C. § 3563(b) for a list of all discretionary probation conditions that can be included as conditions of your supervised release.

402 18 U.S.C. § 3583(g).

403 This condition sets a limit on the time that has to be served depending on the defendant's class felony. 18 U.S.C. § 3583(e)(3).

404 18 U.S.C. § 3583(h).

405 18 U.S.C. § 3583(h).

406 18 U.S.C. § 3583(e)(4).

(2) inform you of your right to an attorney or to request that an attorney be appointed for you. If you are currently held in custody, the judge must also inform you of your right to a preliminary hearing. This hearing will determine whether or not there is enough evidence for the judge to decide that you may have violated a term of your supervised release.[407]

If you decide not to give up ("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 (hire) 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.[408] The magistrate judge will either dismiss the case if he finds there is no probable cause (legally sufficient reason) 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.[409] You have the same rights in a revocation hearing that you had in the preliminary hearing. You also have 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 right to present information about mitigating (the effect of making something less severe) factors in your case, and the right to see the witnesses' prior statements.[410] You may waive these rights, but your waiver will only be valid if you knew what the waiver meant and chose to do so voluntarily.[411] At a revocation hearing, any evidence may be used against you, even

---

[407] FED. R. CRIM. P. 32.1(a)(3).

[408] FED. R. CRIM. P. 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, 985–986 (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, 481, 92 S. Ct. 2593, 2600, 33 L. Ed. 2d 484, 494 (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, due to long-established recognition of the reliability of documentary evidence, the releasee had a minimal interest in confronting the lab technician who ran his sweat patch reports showing cocaine use at his supervised release revocation hearing). 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 the revocation of your supervised release. United States v. Walker, 117 F.3d 417, 420 (9th Cir. 1997) (stating that the court must use a balancing test in which it "consider[s] the importance of the evidence to the court's finding, the releasee's opportunity to refute the evidence, and the consequences of the court's finding (citing United States v. Martin, 984 F.2d 308, 312 (9th Cir. 1993))).

[409] 18 U.S.C. § 3583(e)(3).

[410] FED. R. CRIM. P. 32.1(b)(2); *see also* FED. R. CRIM. P. 26.2(g)(3).

[411] United States v. Correa-Torres, 326 F.3d 18, 22–24 (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).

evidence taken without probable cause[412]—you cannot defend yourself by saying that the government gathered evidence improperly.

4. 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 request. 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.[413] 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.[414] You can also apply to (ask) 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.[415]

5. 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 (removed).[416] If you apply before you have served at least one year and one day of supervised release, the court will dismiss your petition.[417] In deciding on your request, the court will first look at "many of the same factors" used to determine your original sentence.[418] It will then decide whether terminating your supervised release is in the interests of justice and supported by your post-imprisonment conduct.[419] 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.[420]

---

[412] United States v. Hebert, 201 F.3d 1103, 1104 (9th Cir. 2000) (holding "that the exclusionary rule does not apply to supervised release revocation hearings").

[413] FED. R. CRIM. P. 32.1(c)(1).

[414] FED. R. CRIM. P. 32.1(c)(2).

[415] United States v. Lilly, 206 F.3d 756, 762-763 (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).

[416] 18 U.S.C. § 3583(e)(1).

[417] United States v. Werber, No. 90 Cr. 364 (LMM), 1995 U.S. Dist. LEXIS 12307, at *1–2 (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)).

[418] United States v. Lussier, 104 F.3d 32, 34–35 (2d Cir. 1997). (The factors include "i) the nature and circumstances of the offense and the history and characteristics of the defendant, 18 U.S.C.S. § 3553(a)(1); (ii) the need for the sentence imposed to afford adequate deterrence to criminal conduct, 18 U.S.C.S § 3553(a)(2)(B); (iii) the kinds of sentence and the sentencing range established for the applicable category of offense or violation of probation or supervised release committed by the applicable category of defendant under 18 U.S.C.S. § 3553(a)(4); (iv) any pertinent policy statement issued by the Sentencing Commission; and (v) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct. 18 U.S.C.S. § 3553(a)(6)").

[419] 18 U.S.C. § 3583(e)(1).

[420] United States v. Lai, 458 F. Supp. 2d 177, 177 (S.D.N.Y. 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. P. 32.1(c). This rule states that a hearing is not required if your request does not extend the term of your supervised release and the relief you seek would benefit you).

6. 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 if you believe the condition places a heavy limit on your liberty without meeting any goals of your supervised release. If a discretionary (left to individual choice/judgement) condition of supervised release places too much of a burden on a protected liberty interest, without furthering your rehabilitation or protecting the public, a court can order the condition be changed. This modification will include no greater limit on your liberty than necessary to meet your supervised release goals.[421] The court will first determine whether you have a recognized liberty interest[422] affected by the challenged condition and then determine the sentencing goal of that condition and its reasonableness.[423] The sentencing goal may relate to the offense for which you are currently in prison or to a past offense.[424] 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.

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.[425] 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[426] and the new conditions relate to a rehabilitation goal and do not unduly (overly) limit your liberty interests.[427]

---

[421] United States v. Monteiro, 270 F.3d 465, 472–473 (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").

[422] *See* United States v. Myers, 426 F.3d 117, 125 (2d Cir. 2005) (stating that the court "must ask first whether the condition at issue . . . deprived [the releasee] of any cognizable liberty interest," and discussing liberty interests in the context of constitutionally-protected interests); *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).

[423] United States v. Myers, 426 F.3d 117, 125–130 (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. His original sentence for child pornography involved only females, and 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).

[424] United States v. Dupes, 513 F.3d 338, 344 (2d Cir. 2008) (for defendant who was convicted of securities fraud, court upheld the following conditions of supervised release: 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, 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).

[425] 18 U.S.C. § 3583(e)(2).

[426] 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).

[427] 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).

P. Federal Executive Clemency

The President of the United States has the constitutional power of executive clemency and can pardon, commute, or reprieve (cancel) a sentence, and to forgive fines, for conviction of a federal offense.[428] It is important to note that executive clemency is very hard to get. The table below shows how many requests for pardons and communtations were received versus how many were granted during the last three presidencies.[429]

President	Pardons		Commutations	
	Received	Granted	Received	Granted
Obama (2008–2017)	3,395	212 (6.2%)	33,149	1,715 (5.1%)
Trump (2017–2021)	1,969	144 (7.3%)	10,109	94 (0.9%)
Biden (2021– March 2024)	925	13 (1.4%)	8,199	124 (1.5%)

The main forms of relief explained in this section—pardon and commutation—only apply to convictions for federal crimes.[430] 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 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 a declaration of your 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.[431] But you can also note that you received a federal pardon for the offense.[432]

You should wait five years after the date of your release from prison before you can seek a presidential pardon.[433] You should not request a pardon while you are on supervised release, parole, or probation, and the five year timeline begins with your latest release from prison for any crime, even

---

[428] U.S. CONST. art. II, § 2; *see also* 28 C.F.R. § 1.1 (2023); *see also* Richards v. United States, 192 F.2d 602, 610 (D.C. Cir. 1951) (finding that the President has the broad constitutional power to pardon in either limited or conditional terms, or "may be made specific as to effect; for example, to restore civil rights, or to remit fines or other penalties").

[429] U.S. Dept. of Justice, *Clemency Statistics*, *available at* https://www.justice.gov/pardon/clemency-statistics (last visited Mar. 31, 2024). Note that the statistics for the Biden presidency were only available through March of 2024.

[430] 28 C.F.R. § 1.4 (2023).

[431] U.S. Dept. of Justice, *Pardon Information and Instructions*, *available at* https://www.justice.gov/pardon/pardon-information-and-instructions (last visited Oct. 8, 2023).

[432] U.S. Dept. of Justice, *Pardon Information and Instructions*, *available at* https://www.justice.gov/pardon/pardon-information-and-instructions (last visited Oct. 8, 2023).

[433] 28 C.F.R. § 1.2 (2023).

if you are seeking a pardon for a previous offense.[434] 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.[435]

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.[436]

To request a federal pardon, you must submit a completed, signed, and dated pardon form to the United States Pardon Attorney at USPARDON.Attorney@usdoj.gov. If you are not able to email the form, you can instead mail it to this address:

Office of the Pardon Attorney
U.S. Department of Justice
950 Pennsylvania Ave.
Washington, DC 20530

Pardon forms are available online at: https://www.justice.gov/pardon/file/960581/download.

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,[437] or shorten or terminate your sentence of supervised release.[438] Commutations are rarely granted. Commutation is purely discretionary, which means that it is up to the President to decide, 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 reasons for granting or denying your petition for commutation. You have no right to appeal the denial of your request for commutation.

---

[434] 28 C.F.R. § 1.2 (2023) ("No petition for pardon should be filed until the expiration of a waiting period of at least five years after the date of the release of the petitioner from confinement").

[435] U.S. Dept. of Justice, *Pardon Information and Instructions*, *available at* https://www.justice.gov/pardon/pardon-information-and-instructions (last visited Oct. 8, 2023).

[436] U.S. Dept. of Justice, *Pardon Information and Instructions*, *available at* https://www.justice.gov/pardon/pardon-information-and-instructions (last visited Oct. 8, 2023).

[437] U.S. DEPT. OF JUSTICE, JUSTICE MANUAL: STANDARDS FOR CONSIDERATION OF CLEMENCY PETITIONS § 9-140.113 (2018), *available at* https://www.justice.gov/pardon/about-office-0 (last visited Oct. 8, 2023) (explaining that a commutation can change a sentence to time served, or reduce a sentence); *see also* Nicholson-El v. Conley, No. 5:01-0798, 2001 U.S. Dist. LEXIS 24168, at *2–4 (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 consecutive sentences, but that the commutation did not change the sentences to make them run concurrently).

[438] 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* https://www.justice.gov/pardon/commutation-instructions (last visited Oct. 8, 2023). For more information on the termination of supervised release, see Part O(8) of this Chapter.

(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.[439] 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:[440]

(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).[441]

Examples of exceptional or unusual circumstances include: 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.[442] 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.[443] 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." [444]

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
U.S. Department of Justice
950 Pennsylvania Ave.
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.

---

[439] U.S. DEPT. OF JUSTICE, JUSTICE MANUAL: STANDARDS FOR CONSIDERATION OF CLEMENCY PETITIONS § 9-140.113 (2018), *available at* https://www.justice.gov/pardon/about-office-0 (last visited Oct. 8, 2023).

[440] 28 C.F.R. § 1.3 (2023); *see also* U.S. DEPT. OF JUSTICE, JUSTICE MANUAL: STANDARDS FOR CONSIDERATION OF CLEMENCY PETITIONS § 9-140.113 (2018), *available at* https://www.justice.gov/pardon/about-office-0 (last visited Oct. 8, 2023).

[441] For more information on compassionate release in New York State, see Part J of this Chapter.

[442] U.S. DEPT. OF JUSTICE, JUSTICE MANUAL: STANDARDS FOR CONSIDERATION OF CLEMENCY PETITIONS § 9-140.113 (2018), *available at* https://www.justice.gov/pardon/about-office-0 (last visited Oct. 8, 2023).

[443] U.S. DEPT. OF JUSTICE, JUSTICE MANUAL: STANDARDS FOR CONSIDERATION OF CLEMENCY PETITIONERS § 9-140.113 (2018), *available at* https://www.justice.gov/pardon/about-office-0 (last visited Oct. 8, 2023); *see also* U.S. Dept. of Justice, Office of the Pardon Attorney, *Frequently Asked Questions*, *available at* https://www.justice.gov/pardon/frequently-asked questions (last visited Oct. 8, 2023).

[444] The White House: George W. Bush, *Statement by the President on Executive Clemency for Lewis Libby* (2007), *available at* https://georgewbush-whitehouse.archives.gov/news/releases/2007/07/20070702-3.html (last visited Oct. 8, 2023).

(b) 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.[445] When you complete the form, you must state the truth or you could be fined and/or imprisoned.[446] 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);
(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.

(c) 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.[447] 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.[448] Any requests for additional information will be sent directly to the warden.

(d) 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.[449] 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 or rendered incompetent as a direct result of the offense for which clemency is sought) 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.[450]

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.[451] If the Pardon Attorney

---

[445] 28 C.F.R. § 1.1 (2023). The form is also available at https://www.justice.gov/pardon/file/960561/download (last visited Oct. 8, 2023).

[446] 18 U.S.C. § 1001; *see also* 18 U.S.C. § 3571; *see also* 18 U.S.C. § 3581.

[447] Fed. Bureau of Prisons, Program Statement No. 1330.15, at 4 (2001) (*as revised* May 2, 2014), *available at* https://www.bop.gov/policy/progstat/1330_015.pdf (last visited Oct. 8, 2023).

[448] Fed. Bureau of Prisons, Program Statement No. 1330.15, at 4 (2001) (*as revised* May 2, 2014), *available at* https://www.bop.gov/policy/progstat/1330_015.pdf (last visited Oct. 8, 2023).

[449] 28 C.F.R. § 1.6(a) (2023).

[450] 28 C.F.R. § 1.6(b)(3) (2023).

[451] 28 C.F.R. § 1.6(c) (2023).

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, as long as you are not serving a death sentence.[452] Your case can also be closed if the President denies your application directly after reviewing it.[453] You will receive notice about the denial from the warden at your facility.[454] 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.[455] If you are already on parole or supervised release when your petition is granted, the warrant will be sent to you directly.[456] Your sentence will then be recalculated and, if you are now eligible for a parole hearing, you will be added to the docket.[457] 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.

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 which of these programs you may use. In general, you can decrease the amount of time in prison by showing good behavior, because good behavior can earn you good-time credit or merit-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 an executive clemency 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.

---

[452] 28 C.F.R. § 1.8(b) (2023).

[453] 28 C.F.R. § 1.8(a) (2023).

[454] Fed. Bureau of Prisons, Program Statement No. 1330.15, at 6 (2001) (*as revised* May 2, 2014), *available at* https://www.bop.gov/policy/progstat/1330_015.pdf (last visited Oct. 8, 2023).

[455] 28 C.F.R. § 1.7 (2023).

[456] 28 C.F.R. § 1.7 (2023).

[457] Fed. Bureau of Prisons, Program Statement No. 1330.15, at 6 (2001) (*as revised* May 2, 2014), *available at* https://www.bop.gov/policy/progstat/1330_015.pdf (last visited Oct. 8, 2023).