Addressing Legal Aspects of Implementation Challenges from Expanded Use of Home Confinement and Compassionate Release

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INTRODUCTION

On December 21, 2018, the First Step Act of 2018 ("FSA"), Pub. L. No. 115-391, was enacted. The FSA created sweeping reforms to the criminal justice system, including front-end and back-end sentencing reforms.[1] About one year after the enactment of the FSA, the Coronavirus Disease 2019 (COVID-19) pandemic expanded across the United States.

Soon after the pandemic began, there was a sharp increase in the level of advocacy for expanding the use of compassionate release and home confinement to increase the number of inmates released from imprisonment. By the end of March 2020, the Attorney General and Bureau of Prisons (BOP) Director had heard from various senators expressing concerns about the health of federal prison staff and inmates and urging that steps be taken to protect vulnerable inmates by using existing statutory authorities, including provisions of the FSA. To address concerns, the Attorney General issued memoranda to the BOP directing the BOP to prioritize the use of home confinement, because some at-risk inmates who are non-violent and pose minimal likelihood of recidivism may be safer serving their sentences in home confinement.

On March 27, 2020, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. 116-136, was enacted in response to the COVID-19 pandemic. Among other relief initiatives, the Act temporarily broadens the authority of the BOP to place inmates in prerelease home confinement for a period determined appropriate by the Director of the BOP.

Combined with the COVID-19 pandemic, the FSA has led to a significant increase in the number of inmates seeking early release from prison through expanded use of home confinement and compassionate release. This article highlights some of the major implementation challenges presented by the recent expanded authority under the FSA and CARES Act to release inmates early to the community, and the response of the Judicial Conference and its Criminal Law Committee, working with the Administrative Office of the U.S. Courts, to these implementation challenges.

Overview of Four Statutory Provisions Authorizing Release from Prison That Have Been Impacted by the FSA and/or COVID-19 Pandemic

The FSA and COVID-19 pandemic have had a significant impact on four prominent statutory provisions that authorize release of a person from prison: (1) 18 US.C. § 3624(c) (traditional early prerelease); (2) 18 U.S.C. § 3624(g) (release for risk and needs assessment system participants; (3) 34 U.S.C. § 60541 (release under the elderly and family reunification for certain nonviolent offenders pilot program); and (4) 18 U.S.C. § 3582(c)(1)(A) (compassionate release).

Under 18 U.S.C. § 3624(c), also known as "traditional prerelease custody," the Bureau of Prisons (BOP) has authority to release an inmate into the community up to 12 months prior to the end of the inmate's prison term.[2] As part of the BOP's authority under § 3624(c), the BOP may place an inmate in home confinement "for the shorter of 10 percent of the term of imprisonment of that [inmate] or 6 months."[3] To the extent practicable, the BOP must place inmates with lower risk levels and lower needs on home confinement for the maximum amount of time permitted.[4]

This statutory provision has been impacted by the COVID-19 pandemic and the enactment of the CARES Act. Specifically, the CARES Act temporarily expanded prerelease custody to home confinement under 18 U.S.C. § 3624(c)(2) by increasing the cohort of

[1] For more information about the FSA and its criminal justice reforms, *see* Whetzel & Johnson, *To the Greatest Extent Practicable – Confronting the Implementation Challenges of the First Step Act*, Federal Probation, Vol. 83.3 (Dec. 2019); *All Hands On Deck!—Toward a Reentry-Centered Vision for Federal Probation,* this issue, Federal Probation, Vol. 83.3 (Dec. 2020).

[2] "The Director of the Bureau of Prisons shall, to the extent practicable, ensure that a prisoner serving a term of imprisonment spends a portion of the final months of that term (not to exceed 12 months), under conditions that will afford that prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community. Such conditions may include a community correctional facility." 18 U.S.C. § 3624(c)(1).

[3] 18 U.S.C. § 3624(c)(2).

[4] *Id.*

inmates who can be considered for home confinement and by temporarily allowing the BOP Director to lengthen the maximum amount of time a prisoner spends on home confinement.[5]

Although the FSA did not amend traditional early prerelease authority under 18 U.S.C. § 3624(c), it had a direct impact on the other three statutory provisions authorizing early release from prison. The FSA created 18 U.S.C. § 3624(g), which allows eligible participants of the risk and needs assessment program to earn time credits and be released early from prison. Program participants eligible for early release are placed in prerelease custody or supervised release for an amount of time that is equal to the remainder of their term of imprisonment.

The FSA not only expanded prerelease custody under 18 U.S.C. § 3624(g) (risk and needs assessment program), it also expanded early release to the community through the elderly home confinement program. Under 34 U.S.C. § 60541(g), the elderly home confinement program was expanded by including eligible terminally ill offenders, reducing the age eligibility for elderly offenders from 65 years old to 60 years old, and reducing the time an elderly offender must serve to be considered eligible for the program from 75 percent to two-thirds of the term of imprisonment sentenced.

Furthermore, the FSA expanded authority to reduce a term of imprisonment under 18 U.S.C. § 3582(c)(1)(A), which is sometimes referred to as the "compassionate release statute." Compassionate release provides for an individual's release from prison when illness, age, or other circumstances lead to the conclusion that continued incarceration no longer serves the ends of justice. Prior to enactment of the FSA, inmates were required to petition the BOP for compassionate release; the BOP then made recommendations to the court after conducting an extensive investigation and developing a plan for release to the community that addressed the inmate's home, medical, and other needs. The FSA now allows inmates to make motions directly to the court, under 18 U.S.C. § 3582(c)(1)(A), if the BOP does not act on an inmate's motion within 30 days or if the inmate has fully exhausted all administrative rights to appeal a failure of the BOP to bring a motion on the defendant's behalf (whichever is earlier).[6]

Criminal Law Committee Actions Taken to Address FSA Implementation Challenges

The provisions of the FSA and the CARES Act that expand the authority to release inmates early to the community have presented significant implementation challenges. Two areas posing particular challenges include prerelease custody to home confinement and compassionate release. The increase in the number of inmates released early to the community resulting from FSA provisions and the COVID-19 pandemic has also had a significant impact on the management of criminal cases in the courts and on the U.S. Probation and Pretrial Services Offices.

To aid with implementation challenges, the Judicial Conference and Criminal Law Committee have been working to make improvements in the administration of criminal law. The Judicial Conference of the United States was created by Congress in 1922. Its fundamental purpose is to make policy for the administration of the United States courts, including the probation and pretrial services system. The Conference operates through a network of committees. One of the committees, the Criminal Law Committee, oversees the federal probation and pretrial services system and reviews legislation and other issues relating to the administration of the criminal law.

To reduce challenges presented by the COVID-19 pandemic and implementation of the FSA, the Criminal Law Committee recommended, and the Judicial Conference subsequently approved, several legislative changes in April and June 2020 to improve the administration of the criminal justice system. These legislative proposals and other Committee actions are discussed below.

Criminal Law Committee Actions Relating to Prerelease Custody to Home Confinement

The Criminal Law Committee recommended two proposed legislative changes to address challenges related to prerelease custody to home confinement. The first proposed legislative fix seeks to clarify the obligation of the U.S. probation system to assist inmates on prerelease.[7] As discussed above, there are three different statutory provisions that authorize the BOP to release an inmate into the community: 18 U.S.C. §§ 3624(c) and (g), and 34 U.S.C. § 60541(g). Under each provision, United States probation officers are authorized to supervise inmates in the custody of the BOP who have been placed on prerelease custody; however, all the provisions differ in the degree of officer assistance required. If an individual is released to home confinement under 18 U.S.C. § 3624(c), the probation system must offer assistance "to the extent practicable"; if an individual is released pursuant to the BOP's risk and needs assessment system under 18 U.S.C. § 3624(g), the probation system must offer assistance "to the greatest extent practicable"; and if an individual is released pursuant to the BOP's elderly home confinement program under 34 U.S.C. § 60541(g), the probation system must offer "such assistance . . . as the Attorney General may request."

The differing language for all three provisions creates inconsistent requirements for U.S. probation's involvement in assisting inmates on prerelease custody. The language discrepancies in the three provisions, requiring different degrees of assistance from the probation system, also fail to take into account that the federal probation system does not always have the resources necessary to supervise prerelease inmates. The lack of resources is even more problematic under the expanded release authorities of the FSA and in response to the COVID-19 pandemic. Additionally, the language fails to take into account that any arrangement to supervise prerelease inmates should be jointly agreed to by the BOP and the probation system.

To clarify and harmonize the obligation of the federal probation system to assist inmates on prerelease custody, in April 2020 the Criminal Law Committee recommended amending the more compulsory language of 18 U.S.C. § 3624(g) and 34 U.S.C. § 60541(g) to track the more permissive language of 18 U.S.C. § 3624(c). Specifically, the Criminal Law Committee recommended that 18 U.S.C. § 3624(g) and 34 U.S.C. § 60541(g) be amended to require the U.S. probation system to provide assistance only "to the extent practicable." On April 21, 2020, the Executive

[5] The appropriate length of expansion is to be determined by the Director of the BOP.

[6] The motion made to the court under 18 U.S.C. § 3582(c)(1)(A) is a request for a sentence reduction. Under the statute, if the court finds that certain circumstances are met, the court may reduce a term of imprisonment, including a reduction to "time served." Generally, a sentence reduction to "time served" results in the immediate release of the inmate from BOP custody.

[7] Prerelease inmates released to the community remain in the custody of the BOP. The majority of prerelease inmates are supervised by private contractors; however, the U.S. probation system is authorized to assist the BOP with supervising prerelease inmates.

Committee, acting on an expedited basis on behalf of the Judicial Conference,[8] approved the proposal and included it in a legislative package submitted to House and Senate Judiciary Committee staff to be considered for inclusion in supplemental legislation to respond to the COVID-19 pandemic.

The second legislative proposal relating to prerelease custody to home confinement that the Criminal Law Committee recommended focuses on promoting the effectiveness of location monitoring. While the location monitoring program[9] is most commonly used as a condition of pretrial release, probation, or supervised release, the probation and pretrial services system also uses it to provide assistance to BOP inmates in three forms of prerelease custody: (1) "home detention" under the elderly and family reunification for certain nonviolent offenders pilot program under 34 U.S.C. § 60541(g)(1)(A)[10]; (2) "home confinement" under 18 U.S.C. § 3624(c)[11]; and (3) "home confinement" for FSA risk and needs assessment system participants under 18 U.S.C. § 3624(g).[12] Each category of release, however, carries different statutory requirements for the method of monitoring. Persons on supervision under 18 U.S.C. § 3624(g) are required, except when it is "infeasible for technical or religious reasons," to be "subject to 24-hour electronic monitoring that enables the prompt identification of the prisoner, location, and time." Persons on supervision under 34 U.S.C. § 60541(g)(1)(A) are required to be monitored in accordance with the description of "home detention" under the Federal Sentencing Guidelines as of April 2008, which "ordinarily" requires that persons be supervised by electronic monitoring unless alternative means of surveillance are "as effective as electronic monitoring." Section 3624(c) of Title 18 does not specify the required form of monitoring.

The different statutory requirements create challenges to the effective and efficient implementation of the location monitoring program. Each of the current statutory frameworks is also in tension with the probation system's own policies and procedures for using appropriately tailored supervision methods to ensure effective and efficient supervision that allows for a more flexible adjustment of the level of supervision based on the recidivism risk of the individual under supervision. Section 3624(g)'s requirement for the use of "24-hour electronic monitoring that enables the prompt identification of the prisoner, location, and time," except where "infeasible for technical or religious reasons," unduly burdens the location monitoring program and limited probation resources by effectively requiring that GPS technology be used in most cases. GPS technology is costly, requires close monitoring of the data by the supervising probation officer and thus creates heavier workloads for officers, may not be appropriate for persons with medical conditions that prevent them from wearing or charging the ankle bracelet, and may be unnecessary depending on the risk level, criminogenic needs, and circumstances of the individual on location monitoring. However, these types of considerations would not fall under the "infeasible for technical or religious reasons" exception. Other widely available and commonly used location monitoring technology, such as voice verification or radio frequency, may be as effective and a more efficient means for monitoring persons under supervision.

While 34 U.S.C. § 60541(g)(1)(A) defines "home detention" as it is used in the 2008 Federal Sentencing Guidelines; those guidelines were amended in 2018 to better reflect the probation system's own more flexible location monitoring policies and procedures. Instead of the 2008 requirement that electronic monitoring "ordinarily" be used unless alternative means of surveillance are "as effective as electronic monitoring," the 2018 guidelines instruct that electronic monitoring or any alternative means of surveillance may each be used as "appropriate."[13] The specific reference to the 2008 version of the guidelines in 18 U.S.C. § 60541(g)(1)(A) precludes the probation system from relying on this more updated version.

Finally, while 18 U.S.C. § 3624(c) does not specify any particular method of monitoring that must accompany home confinement under that section, the statute's silence on that matter subjects BOP prerelease custody inmates under the supervision of the probation and pretrial services system by default to BOP's policies and procedures. These do not necessarily track the probation system's own policies and procedures for ensuring consistency with established social science research on the effectiveness of supervision, and they do not account for limited supervision resources. Thus, a statutory amendment to 18 U.S.C. § 3624(c) would allow the probation system to follow what it considers to be more appropriate monitoring protocols even where they may conflict with BOP policies.

To harmonize the requirements for "home detention" and "home confinement" across 18 U.S.C. §§ 3624(c) and (g) and 34 U.S.C. § 60541(g), the Criminal Law Committee recommended that the Judicial Conference seek legislation to adopt the 2018 Sentencing Guideline definition of "home detention" for each. Under the 2018 Sentencing Guidelines definition, "[e]lectronic monitoring is an appropriate means of surveillance for home detention. However, alternative means of surveillance may be used if appropriate." In addition to adding consistency and clarity to the statutory scheme, the flexibility afforded by this definition would allow for more efficient and effective implementation

[8] The Executive Committee of the Judicial Conference serves as the senior executive arm of the Conference, acting on its behalf between sessions on matters requiring emergency action as authorized by the Chief Justice. In emergency matters, only the Executive Committee has authority to act on the Conference's behalf as provided in its jurisdictional statement.

[9] The location monitoring program of the probation and pretrial services system provides officers with an array of electronic monitoring technologies and other surveillance options to assist them in supervising persons released to the community. The use of appropriately tailored location monitoring technology can create supervision efficiencies by providing a better allocation of time and therefore avoid under-supervising high-risk persons under supervision and over-supervising low-risk persons under supervision. *Guide to Judiciary Policy*, Vol. 8F, Section 160.

[10] Section § 60541(g)(4) of Title 34 requires that the Administrative Office of the United States Courts and the United States probation offices provide such assistance and carry out such functions as the Attorney General may request in monitoring, supervising, providing services to, and evaluating eligible elderly offenders and eligible terminally ill offenders released to home detention under this section.

[11] Section 3624(c)(3) of Tile 18 requires that the probation and pretrial services system, to the extent practicable, offer assistance to a prisoner during prerelease custody under this subsection.

[12] Section 3624(g)(8) of Title 18 requires the probation and pretrial services system, to the greatest extent practicable, to offer assistance to any prisoner not under its supervision during such prerelease custody.

[13] In explaining the reason for this change, the Federal Sentencing Guidelines Manual notes that the U.S. Sentencing Commission received testimony consistent with the probation system's concerns that electronic monitoring is resource-intensive and otherwise demanding on probation officers, as well as inconsistent with the evidence-based "risk-needs-responsivity" model of supervision and may be counterproductive for certain lower-risk offenders.

of home detention and maximize use of limited resources in the probation and pretrial services system. In June 2020, the Judicial Conference approved the Criminal Law Committee's recommendation and agreed to seek such legislation.

Criminal Law Committee Actions Relating to Compassionate Release

In addition to making recommendations to ease implementation challenges related to prerelease custody to home confinement, the Criminal Law Committee also made recommendations to address issues arising from compassionate release motions.

As noted above, the FSA amended 18 U.S.C. § 3582(c)(1)(A) to permit a defendant to make a motion for compassionate release directly to a court (rather than through the BOP) after the defendant has fully exhausted all administrative rights to appeal a failure of the BOP to bring a motion on the defendant's behalf, or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier. These expanded procedures, combined with the recent COVID-19 pandemic, have led to an increase in requests for compassionate release made to both the BOP and the courts. This increase in turn has led to a lag in obtaining inmate medical records from the BOP to assess whether an inmate may qualify for compassionate release based on medical needs. To address these issues, the Criminal Law Committee recommended that the Executive Committee act on an expedited basis on behalf of the Judicial Conference to seek legislation amending 18 U.S.C. § 3582(c)(1)(A). The recommended legislation would provide that if a motion for reduction of the imprisonment term includes as a basis for relief that the defendant's medical condition warrants a reduction, the BOP must promptly provide the defendant's BOP medical records to the court, the probation office, the attorney for the government, and the attorney for the inmate. If additional time is required by the BOP to produce such records, they are to be produced within a time frame ordered by the court. The Executive Committee approved the recommendation and included it in a legislative package submitted to House and Senate Judiciary Committee staff to be considered for inclusion in supplemental legislation to respond to the COVID-19 pandemic.

The Criminal Law Committee also made a recommendation to the Judicial Conference to seek legislation to clarify how the imposition of a term of probation or supervised release authorized under the compassionate release statute interacts with a previously imposed term of supervised release. The compassionate release statute, 18 U.S.C. § 3582(c)(1)(A), authorizes a judge to modify a term of imprisonment and permits the judge to impose a term of supervised release or probation when granting compassionate release. Specifically, it states "the court . . . may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment)[.]"

Supervised release authorized under this provision is sometimes referred to as a "special term" of supervision, and the language authorizing its imposition was added to the compassionate release statute in 2002. The special term of supervision was rarely imposed, because prior to the FSA only a small number of compassionate release cases were being granted, and those were typically reserved for terminally ill persons. Accordingly, supervision upon release was probably not a major concern, and therefore fewer special terms of supervision were being imposed. Since the FSA was enacted, there has been a substantial increase in the number of motions for compassionate release filed with the courts, particularly during the COVID-19 pandemic. With the increased number of compassionate release cases resulting from the FSA and COVID-19 pandemic, more courts are granting compassionate release and imposing a special term of supervised release.

Although the judge is authorized to impose a special term of supervised release under the compassionate release statute, the statute provides no guidance on how this special term should be imposed, whether a judge can revoke and reimpose a special term of supervision, or how the special term interacts with a previously imposed term of supervised release. In September 2020, the Judicial Conference, upon the Criminal Law Committee's recommendation, agreed to seek legislation to clarify how an original term of supervised release interacts with an additional term of supervised release imposed under 18 U.S.C. § 3582(c)(1)(A).

In addition to recommending legislative fixes to clarify provisions of the compassionate release statute and ease implementation of FSA provisions affecting compassionate release, the Criminal Law Committee also endorsed a standardized court order and pro se form to be used in connection with motions for compassionate release. As discussed, courts have seen an increase in the number of compassionate release motions as a result of the FSA and COVID-19. The pro se compassionate release motions vary significantly in their level of detail and often do not have the information necessary for courts to make prompt and informed decisions. To assist courts with streamlining the process of filing and considering compassionate release motions and to help the federal probation system obtain information necessary for verifying a release plan, the Criminal Law Committee, at its June 2020 meeting, endorsed a standardized court order and pro se form to be used in connection with motions for compassionate release under 18 U.S.C. § 3582(c)(1)(A).[14]

Criminal Law Committee Actions to Address Extended Periods of Supervision

The provisions of the FSA and CARES Act expanding prerelease custody to home confinement have resulted in an increased number of persons released early from incarceration and spending an extended period of time in prerelease custody through compassionate release and home confinement. Many of the individuals released to home confinement could remain on this status for months or even years. Despite being in the community on prerelease home confinement for extended periods of time before their release from BOP custody, these individuals must then serve their terms of supervised release. Under 18 U.S.C. § 3583(e)(1), defendants who have been in extended prerelease custody must still wait one year before becoming eligible for early termination of supervised release.[15]

[14] The forms (AO 248 and AO 250) are available on www.uscourts.gov. The pro se form (AO Form 250) was also sent to the Bureau of Prisons to be made available to inmates seeking to file pro se motions for compassionate release with the courts.

[15] Under 18 U.S.C. § 3583(e)(1), a court may terminate a defendant's term of supervised release at any time after the defendant has served one year of supervised release, if warranted by the defendant's conduct and the interest of justice. In 2013, noting that there are cases where early termination would be appropriate prior to one year, and based on factors independent of the offender's conduct (for example where defendants are physically incapacitated, dying, or aged to the point that they are no longer a risk to the community and cannot meaningfully engage in the supervision process), and that it makes little policy or financial sense to keep such cases under supervision, the Criminal Law Committee recommended, and the Judicial

This requirement can result in unnecessary supervision of persons who no longer require such supervision under the risk principle,[16] including many elderly and terminally ill persons who may be physically incapacitated, dying, or aged to the point that they are no longer a risk to the community and cannot meaningfully engage in the supervision process. Serving a term of supervised release after a period of prerelease custody that offered the same or substantially similar services can be duplicative, resulting in over-supervision in some cases that may even be counter-productive and reduce a person's chance of success. Additionally, the increased number of persons on supervision and the longer periods of supervision can be costly and demanding on the U.S. probation system, taking focus away from higher priority cases.

In April 2020, the Executive Committee agreed, based on a recommendation by the Criminal Law Committee, to act on an expedited basis on behalf of the Judicial Conference to seek legislation that permits the early termination of supervision terms, without regard to the limitations in 18 U.S.C. § 3583(e)(1), for an inmate who is released from prison under 18 U.S.C. §§ 3582(c), 3624(c), or 3624(g), or under 34 U.S.C. § 60541(g).

Future Implementation Initiatives

The FSA will take several years to fully implement, and there are a substantial number of unanswered questions that will need to be addressed.

One of the most significant provisions of the FSA with longer term implications is the requirement that the DOJ create, and the BOP implement, a risk and needs assessment system and recidivism reduction programming that may result in early release to the community through prerelease custody or supervised release for certain inmates. The BOP is in the early stages of a two-year phase-in period of implementing the risk and needs assessment system. As of January 2020, all inmates have received their initial risk assessment classification from the BOP, which will be used to determine eligibility for participation in programming to earn credits toward early release. Any challenges faced by expanded home confinement will continue to be evaluated, including the need for adequate resources for the probation and pretrial services system, which is anticipated to be impacted by the number of persons obtaining early release under the risk and needs assessment system program.

Additionally, there remain unanswered questions about how the imposition of a term of probation or supervised release under the compassionate release provisions of 18 U.S.C. § 3582(c)(1)(A) interacts with a previously imposed term of supervised release. As noted above, the Judicial Conference agreed to seek legislation to clarify this issue.

The Criminal Law Committee remains committed to addressing FSA implementation challenges and challenges faced by expanded home confinement. The Criminal Law Committee will continue to collaborate with stakeholders to understand the potential impact of the COVID-19 pandemic and the FSA on the administration of the criminal justice system and discuss ways to address challenges that may arise.

Conference approved, seeking legislation that permits the early termination of supervision terms, without regard to the limitations in 18 U.S.C. § 3583(e)(1), for an inmate who is compassionately released from prison under section 3582(c) of that title (JCUS-SEP 13, p. 18).

[16] According to well-established social science research, the "risk principle" states that over-supervision of persons in the community may inhibit their chance of success in the community and in some cases may even make success less likely by disrupting the person's prosocial networks.