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Applying for Compassionate Release as a Pro Se Litigant

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ABSTRACT

This Essay describes the importance of exhaustion of administrative remedies to filing petitions for compassionate release as a pro se litigant. The exhaustion requirement has traditionally functioned as a barrier to filing petitions in federal court. It can often take months or over a year to fulfill the exhaustion requirement, which means that people seeking compassionate release are at risk of dying in prison while they try to fill the requirement. The author filed a petition pro se after the passage of the First Step Act, which limited the exhaustion requirement, and was successfully granted release in March 2020.

AUTHOR

Lynn Reece is a native of Dallas, Texas. He has owned a restaurant and catered for Fortune 500 companies in the Houston area. He was sentenced to 360 months in federal prison in 1994 and filed for compassionate release in mid-2019. Because of the First Step Act, he filed in federal court and the U.S. Attorney's office responded that they had no objection to his release. Mr. Reece was transferred to Oakdale Federal Correctional Institute in Louisiana shortly before it became one of the first COVID-19 hotspots in the country. The Federal Public Defender filed a supplement to Mr. Reece's petition based on the outbreak, describing that a failure to release him would be synonymous to sentencing him to the death penalty, and Judge Lee Rosenthal ordered his unconditional release the following day. Mr. Reece now lives in the Dallas Metropolitan area and drives commercial trucks cross country, an essential job during the pandemic.



If you represent yourself pro se—meaning without an attorney—the courts will give you a pass if your petition is not perfect, because they understand that you are a layman. But the Bureau of Prisons (BOP) will not give you a pass if you make a mistake, even if it’s simply missing a maturity date in your response.¹ Therefore, exhausting your administrative remedies is an intricate and essential assignment. The incarcerated person must follow each step to the letter or their petition in federal court will be dismissed. The purpose of the process is to disclose your complaint to BOP and give BOP an opportunity to correct their own remedy if it is correctable. Exhaustion of administrative remedies is a problem across the system.² When it comes to civil lawsuits against the prison system, the exhaustion requirement protects the system because it keeps you from filing against an officer or facility. This Essay focuses on the exhaustion requirement for petitions for compassionate release, which changed in 2018 after the passage of the First Step Act.³

Initiating an application for compassionate release starts with a general request to your Team Counselor, who has access to all the information about you. The request from is a petition for the form to initiate exhaustion and you have to state your claim to get the form for administrative remedies. This initial stage is called a “BP8” form. The tricky part about this is that in appealing to the next stage, “BP9” form, you can’t cite anything that was not raised in the initial BP8. Accordingly, your petition will be dismissed if you raise new issues and you will be forced to start over. There is also a time limit between when you file the BP8 form and the follow-up BP9 form. Should you miss that deadline, your petition becomes moot and even the U.S. District Court will not have jurisdiction, because you will not have exhausted your administrative remedies. More petitions are dismissed in court for incarcerated people who have failed to exhaust their remedies than for any other reason. This gets complex because the time limit begins to run following the BOP’s reply, but in many cases, the BOP will not reply. In such situations, the incarcerated person must know how to proceed to the next step on the date that the BOP should have

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1. A maturity date is the time limitation within which a person must respond after receiving a Bureau of Prison (BOP) response. The time is set by the warden or a federal judge. If you miss the maturity date, your petition will be dismissed unless you can prove you missed it through no fault of your own.
 2. See generally Ryan Lefkowitz, Note, *Prisoner’s Dilemma—Exhausted Without a Place of Rest(itution): Why the Prison Litigation Reform Act’s Exhaustion Requirement Needs to Be Amended*, 20 ST. MARY L. REV. ON RACE & SOC. JUST. 189 (2018).
 3. Pub. L. No. 115-391, 132 Stat. 5194 (2018).

responded. More complications: Each of the forms that you must file is distributed at the discretion of your Team Counselor. A lot of times, the counselors will drag their feet before letting you have the form. Each move to the next step necessitates a copy of your response and records from the previous step. Therefore, if you did not keep dated copies of what you filed in the previous step, you will have lost your ability to move to the next step. With dated copies of the previous step, one can easily show that the time within which the BOP was supposed to reply has passed, and your time to file for the next step begins to run. If your reply time expires following the BOP's failure to reply, your petition becomes moot. So, back to the initial step: You must allege everything, and supply all evidence and documents that you ultimately want the judge to see and review, in that "initial step one BP8" to be able to continue to raise those issues throughout the appellate process.

The BP8 form from step one goes to your Team Counselor. The BP9 form from step two goes to your prison warden. Their response or failure to respond necessitates step three, a BP10 form, which goes to your Regional Director. Along the way the administration will make matters as complex and as technical as they possibly can to discourage you or to get your petition dismissed for some technical violation. Then you get another form from your counselor which goes to the Washington, D.C. Central Office. If you are denied at this point, then you have officially exhausted your administrative remedies. It can take up to eight months or more to get to a trial court judge based on technicalities, such as failing to be concise or conform to BOP regulations.

Sometimes, when the administration sees that you have been alert enough to continue to your next step despite no reply, they will file for an extension of time and "backdate it." You can't prove they did this, and it forces you to wait an additional month or two for their reply, which may or may not come. Plus, the reply is often an attack on your failure to follow the proper appellate procedures. You must study the U.S. Code of Federal Regulations (CFR); all of the processes are displayed there. The CFR is the BOP's Constitution. All rules and regulations made at the facility must comply with the guidelines provided in the CFR. Incarcerated people are forced to cite CFR statutes to overturn alleged appellate process violations. For example: "Prisoners are not allowed to raise more than one unrelated issue in a petition. A new petition (BP8) must be used for each issue, UNLESS THE ISSUES ARE ALL INTERRELATED AND CONNECTED." If you have an unrelated claim, then they can dismiss your complaint and make you start over. People that are not well-versed in the process might mention

something in their petition about another allegation and the petition will be dismissed without prejudice. They might lose four to five months of work this way. They would deny your appeal and force you to file separate petitions for the shoe and the hat. These are examples of the technicalities that the government uses to get your complaints dismissed. Please be mindful of the fact that copies, postage, and getting the mail certified costs the petitioner money. The mail certifications require the signatures of the mail recipients and list the date received. This protects the petitioner. Without the certification of the mail, the BOP can allege that they never received your petition, or that it was untimely, and dismiss it. When the BOP forces you to start over, you lose all the money and time invested—after several rejections, some people give up! They become discouraged. Please keep in mind that at least 60 percent of the prison attends mandatory GED classes. Many just do not have the education necessary to read law books and comply with the laws and statutes. And exhausting the administrative remedies is a very tough task even for the learned jailhouse lawyer. Most people do not have the money to hire an attorney to handle the compassionate release petition, and you do not have a right to an attorney for these petitions.

Many of the records that the incarcerated person needs are in the government's possession. Most of the time, the BOP will force a jailhouse lawyer to file a request using the Freedom of Information Act (FOIA)⁴ to acquire the documents needed to support the issues raised in their petition. Most of the time, the respondent will state that the petitioner has not supplied any evidence to support their claim and dismiss the petition. Back to step three: Should the regional director fail to reverse the warden's decision not to grant relief, the petitioner is then forced to go to step four, the BP11 form, which goes to the director of the Bureau of Prisons in Washington, D.C. Only after the director replies, or fails to reply, has the incarcerated person exhausted their administrative remedies, and can then proceed with their claim to the U.S. District Court. Much of the time, the director will return the petition back to an earlier stage, with instructions to correct a problem or to review the matter. This then places the incarcerated person in another waiting position. Exhausting one's administrative remedies can often take from six months to a year!

In view of the aforementioned information, you can see just how big of a win the First Step Act of 2018 was for people in federal prisons. Now, if the unit warden at the first step does not respond within thirty days, you can

4. 5 U.S.C. § 552.

leave your unit and go straight to the trial court judge instead of the regional director. The mere change in law—that if your warden fails to respond to your petition within thirty days, you may file directly with the U.S. District Court, which then has jurisdiction—was a very meaningful win. Many incarcerated people die during the lengthy exhaustion period while filing for compassionate release. This period is stretched out by a system that is overcrowded and overwhelmed, in addition to knowingly and intentionally creating obstacles for an incarcerated person to move forward.

In the era of COVID-19, some would die if they were forced to exhaust administrative remedies before a federal judge could address the validity of the danger to life that they are raising.⁵ My petition pended for eighteen months—a year in the prison system and six months in the federal court—before I was ultimately released on a COVID-19 petition in March 2020.

My primary goal in this Essay was to explain the challenge of exhausting administrative remedies. It is the estoppel used by BOP to circumvent release; it hampers and hinders the process of trying to get release through a compassionate release petition. The BOP does everything they can to circumvent you from getting before a judge. It is a stiff fight to get your petition through them and to the court. The First Step Act was so powerful for people in the federal prison system because it put a stop to this fight. Now, people in federal prisons have a much shorter timeline to get their petitions for compassionate release in front of a judge. That is no guarantee of freedom but will give people a better chance.

5. See, e.g., Sharon Dolovich, *Mass Incarceration, Meet COVID-19*, U. CHI. L. REV. ONLINE (Nov. 16, 2020), <https://lawreviewblog.uchicago.edu/2020/11/16/covid-dolovich> [<https://perma.cc/JR5E-RNZM>]; Beth Schwartzapfel, Katie Park & Andrew Demillo, *1 in 5 Prisoners in the U.S. Has Had COVID-19*, MARSHALL PROJECT (Dec. 18, 2020), <https://www.themarshallproject.org/2020/12/18/1-in-5-prisoners-in-the-u-s-has-had-covid-19> [<https://perma.cc/C9F2-4RDZ>] (“One in every five state and federal prisoners in the United States has tested positive for the coronavirus, a rate more than four times as high as the general population.”).