Fox Rothschild Podcast

The Presumption of Innocence Podcast Series: Episode 6

It's Never Too Soon to Think About Early Release

Featuring Matthew Adams and Marissa Koblitz Kingman of Fox Rothschild LLP

Adams: Hi everyone. Welcome to "The Presumption of Innocence," a podcast brought to you by the White-Collar Criminal Defense and Regulatory Compliance Practice Group at Fox Rothschild. I'm your host, Matt Adams, one of the partners and co-chairs of the practice area at Fox Rothschild.

Today I am joined by my colleague Marissa Koblitz Kingman, who is a senior associate in our White-Collar Criminal Defense and Regulatory Compliance Practice, and really on the cutting edge when it comes to issues involving sentencing and early release.

Today we're talking about early prison release and other post-conviction relief. A lot of you have read in the headlines that there have been large scale prison releases during the COVID-19 pandemic. According to one set of research that I've seen, in New Jersey alone, the prisoner population has been reduced by more than 30% since November 2020, with over 2,000 individuals released on November 4, 2020 alone. Many of the individuals who have been released and been the subject of other post-conviction applications through the COVID pandemic have had underlying conditions or have been in advanced age. When coupled with relatively minor offenses for which they were incarcerated, a court decided that was the right thing to do. To cull the prison populations would stem the tide of what was just an avalanche of cases in our prison community.

Marissa, when should someone start thinking about potential arguments for early release?

Kingman: Hi Matt. Thank you for having me on. It's never too soon to start to think about arguments for early release. Certainly, when charges are filed or proposed information is presented, and definitely before executing any plea agreement.

Sometimes in plea agreements, in certain areas of the country, the government is going to incorporate language that has the individual waiving their right to file for compassionate release later on. You certainly don't want to execute any kind of plea agreement even if you're healthy at the moment and you think you're going to have a relatively short prison term. You don't know what's going to happen in six, 12 or 18 months. You want to preserve your right to file any kind of application for early release.

Adams: That's a great point. I agree with you entirely that it's never too soon to start thinking about early release.

What, if any, issues can be addressed at sentencing that may impact the ultimate ability to obtain some sort of post-conviction relief from a prison sentence?

Kingman: Sentencing applications really mirror certain early release applications. The District Court considers factors – they're called 3553 factors – to determine the appropriate length of a prison sentence. Those same factors are what a court will assess for a compassionate release application. Some of those factors are just the nature and circumstances of the offense, the history and

characteristics of the individual, the need for the sentence imposed, the kinds of sentences that are available, pertinent sentencing policies and the need to avoid unwarranted sentence disparities. So, when counsel is writing the sentencing memorandum, they want to keep in mind that all of these factors are going to be assessed later on in a compassionate release application. You really want to set the groundwork to make sure you're laying out every single factor. And, if in six to 12 months something changes, your health changes or there's a pandemic or someone in your family passes, you've already laid the foundation that all of these factors are in your favor for early release.

Adams: Yes, and in particular in the white-collar space, we often encounter clients who do anything to avoid prison. When we're writing sentencing memoranda – and you and I have worked on dozens and dozens of these memoranda together – keeping all of the history and characteristics of the offense and the offender, and really spelling it out for the judge, is critically important.

You've mentioned already today a number of times the phrase “compassionate release.” I want to dive right into that and unpack it a little bit. What exactly is compassionate release, Marissa?

Kingman: Compassionate release actually came about in the 1980s, with the Sentencing Reform Act, where the Federal Bureau of Prisons (BOP) was able to file a Motion for Compassionate Release on behalf of the inmate for extraordinary and compelling circumstances. Obviously, BOP almost never filed an application on behalf of an inmate. So, in 2018 with the First Step Act, that was reformed. Then, inmates were allowed to file their own motions, or obviously their counsel on their behalf, without waiting for BOP to do it. All that was necessary is that you had to make a request to BOP first. If BOP simply ignored you or they said no, then the inmate could file their own application for compassionate release. It's asking the court to release you early because of extraordinary and compelling reasons.

Now, what extraordinary and compelling reasons are has changed over time. At first, it was thought that it could only be terminal illness, the caregiver of your child passed away, you were over a certain age and you had a very serious illness. Over time that has changed, and compassionate release really came about during COVID. All of a sudden, in March of 2020, the flood gates opened, and people realized they could use this tool to get out of prison because of the pandemic.

Adams: It's funny you should mention that it was a 2018 legislative construct. At the time, it was really was one of the crowning achievements of the Trump administration. It was intended to afford, in a lot of respects, white-collar criminals the opportunity to ask for release for a host of reasons that may not have been considered at their sentencing.

You've mentioned this concept of extraordinary and compelling reasons. Why don't you walk us through the process that unfolds along the pathway to getting a court to make a determination on whether that extraordinary and compelling rationale for release exists.

Kingman: It's really a two-step process. The first is, the court will consider if extraordinary and compelling reasons exist. There are few that are off the bat going to meet that requirement: If you're terminally ill; if you're over 65 years old and you have a deteriorating physical or mental health issue; or if the caregiver of your minor child has passed away. Since COVID, if you had any of the illnesses that the CDC listed on its website – and, pre-vaccination, nobody was vaccinating the prison – and so if there was COVID in the prison and you had any pre-existing disease, you filed. Depending what was happening in that area of the country, in the prison, and with that particular disease, you could prove extraordinary and compelling reasons to be released.

In addition to the extraordinary and compelling reasons, once you meet that, you have to go through the 3553 factors, which discuss the history and characteristics of the individual, the nature and circumstances of the offense. So, even if you had a very serious illness and COVID was running rampant in that prison, if you committed a heinous crime – a gruesome murder, a crime against a child – the 3553 factors are going to weigh against release.

Adams: When a lot of people started hearing about the idea of thinning out the prison populations because of COVID, there was an argument out there that, somehow, people were getting a free pass. I think you just touched on something. Is the offense being analyzed in addition to the characteristics of the offender?

Kingman: Yes. The offense that the person committed is going to be analyzed and there is no bright-line rule. Have people who committed murders been released? Yes. Is that rare? Yes.

Adams: The process plays out. I know there's a sense for an administrative process that works internally within the facility and then a process by which you then go and take it to the court for an external. Talk to us a little bit about that interplay: The need to exhaust the administrative remedies within the facility and then what happens once you get into court?

Kingman: The first step to apply for compassionate release is you have to make the application to the warden. It's the same kind of application that you're going to make to the court. You literally write a letter to your warden and you request compassionate release. You lay out your medical illnesses, your concern, what's going on in the prison. You say what you're going to do if you're released. You submit it to the warden and then either the warden will respond and say, “Yes, we agree,” And you can be released. Or, the warden will say, “Absolutely not. We don't agree that extraordinary and compelling reasons exist.” Or, the warden will say absolutely nothing and you will not hear back.

If the warden says nothing for 30 days, then you can apply right to the court. If the warden denies it immediately, you can go right to the court. And then, you file a compassionate release application with the court. Again, you lay out your extraordinary and compelling reasons, and then you go into the 3553 factors and you request that the court release you.

The government will generally then oppose your application and say, “Even if you're very sick, even if you're very vulnerable to COVID-19,” – which a lot of times they do not dispute – they will say, “The 3553 factors weigh against release because you haven't been in prison long enough for the kind of crime you committed or the kind of crime you committed is so heinous that as a policy matter, we can't release you.” Or they think you're going to commit another crime upon release.

Then, generally, you'll have the opportunity to respond to the government's opposition.

Adams: You've talked a lot about COVID-19 compassionate release. As we sit here on the precipice of hopefully coming out of this public health crisis that we've had for the last couple of years, where do you see this concept of compassionate release in a post-COVID world?

Kingman: One of the good things that I think came about from COVID-19 compassionate release is that it made the courts reassess who we are putting in prison and for how long. Because if we, as a country and a court and even the government at times, can agree that these people should be released because they may get too sick or they may die, what were they really doing in prison for that long in the first place?

It has changed the way the courts view punishment. It's no longer limited to COVID-19. Certainly, vaccinations now have been out for a long time, and the courts are continuing to release inmates pursuant to compassionate release.

Adams: You were a very significant member of our Fox Rothschild compassionate release task force throughout the last couple of years, as the pandemic was a primary motivator for these kinds of applications. Can you walk us through a couple of examples of situations where clients were released, and to the same token, clients that were not released? Obviously, keeping things anonymous to protect the rights of the accused.

Kingman: We had about a half dozen clients released. Most of them had underlying medical conditions; some serious, some not so serious. None of them were violent offenders. It is much easier to get inmates released for white-collar financial crimes than someone who committed a violent crime.

It's also more likely to get your client released if they have relatively shorter time left. So, if you have six months to three years left, versus three to 10 years left, the court is going to be more inclined to agree that you can be released with the shorter amount of time that you have left.

We also represented two elderly men who did commit serious crimes. But, as we all know, if you're above 65, you have increased vulnerability to COVID-19 and just any other diseases in prison. We made arguments that once the flu season comes around, that resources were so thin in BOP because of this pandemic and losing personnel, that they really couldn't help people with the flu or with pneumonia, with relatively simple illnesses that, pre-pandemic, BOP probably could have handled relatively easily. They can't anymore. And really still, their resources are spread too thin and they're having personnel issues.

So, we didn't only focus on COVID-19 to get people released. We looked at all of their health records, we looked at the particular prison they were in. We were pretty successful in making solid arguments to release these people. Thankfully, the courts were open to it, despite the government opposing us in every single application.

Adams: It's fascinating that you should mention that. It appears that, in the post COVID world, this will result in a renewed focus on that age-old conflict between specific and general deterrents on the one hand, versus the benefit to retracted sentences in prison for white-collar-ish offenses that might be able to be dealt with through other alternatives to imprisonment, like home confinement and things of that variety.

Speak to us a bit, for a moment, based upon your experience, as to what types of factors and other objective criteria that courts use to assess the suitability of home confinement as an alternative to incarceration.

Kingman: I just want to touch on one point when you talk about home confinement, because I think sometimes our clients get this confused.

We can make a compassionate release application to the warden and to the court. Then we can make a CARES Act request. The CARES Act is based on COVID-19, and it's a home confinement memo that the government put out. It lists factors that the BOP will assess to ensure that an inmate is suitable for home confinement, pursuant to the CARES Act. Those are really two different avenues. What BOP will examine to see if the client is suitable for home confinement is if they have

a verifiable release plan. Which just means, where are you going to go if you're released? Who are you going to live with? What's going to be your job? Who's going to be in the home with you? What responsibilities will you have? Are there people out there who will verify that you are going to live with them and that you are going to help in the home and that you are going to help with this job?

They're going to look at institutional discipline. So, if you've been put it the hole, if you've had strikes against you, that's going to weigh against home confinement. If your current offense is violent or not: Nonviolent is going to weigh in favor of home confinement. If you have a very violent offense, they're probably not going to want to put you on home confinement.

They're also going to assess how much time is left in your sentence. If you have less than 50%, less than 25%, certainly that's going to weigh in favor of home confinement. They're also going to look to what kind of activities you're engaged in currently, before you were in prison and while you're in prison, and if you're associated with any kind of gang-related activities. And lastly, they're going to look at your vulnerability to COVID-19. That's all going to be assessed by BOP in determining if you are a suitable candidate for home confinement.

Adams: I think that's pretty fascinating because it reinforces what your expressed opinion was just a short while ago, that this is going to force us, as we come out of COVID, to rethink the way the criminal sentencing process takes place. Traditionally, I don't think home confinement was viewed as significant, despite our efforts, despite the defense bar's efforts. It was viewed as a lesser alternative to incarceration. I think some of the objective criteria that has flowed out of this crisis will transcend into requests at sentencing, before even these early release type applications. I think they're going to be more prevalent now in a sentencing application, building on the experience that we've come out of for the last two years. To just start with that home confinement sentence in the first instance, rather than burden the court system down the road, and revisiting it because somebody was over sentenced at the outset.

Kingman: That's exactly right, Matt. Really close to almost two years now since this began, we realized that now we need to start making these arguments for home confinement at sentencing. Which is why it's so important that you have a sentencing expert or an early release expert from the very beginning. We have successfully been making these arguments that being in prison is harsher than we originally thought. We can really achieve deterrence by putting – especially these white-collar criminals – on home confinement and restricting their rights. If you lay that foundation for sentencing and really from the initial charge, because you want to prove to the court that you are going to be suitable for home confinement. That starts from even before charges. Once you're being investigated, the foundation you need to lay is to start giving back to your community, to start behaving in a way that the court can trust you on home confinement.

Matt, you and I have been successful in making this argument at sentencing. Thankfully, if we do a good enough job at sentencing, we don't then thereafter have to make the early release application. We've done our job at sentencing, and the client does not go to prison.

Adams: This is truly an evolving area of the law. We mentioned that, since the 1980s, we've been talking about sentencing reform with the Sentencing Reform Act. It wasn't until 2018 that the First Step Act was modified and finally allowed the prisoner himself or herself to make these applications through their counsel. We have things that are continuing to evolve, perhaps at a more rapid, and hopefully at a more rapid pace, than the something like the 28 years between the Sentencing Reform Act and First Step Act.

When we talk about the new time credits rules, why don't you unpack that concept for us, Marissa.

Kingman: It happened very recently, in the past few weeks.

The First Step Act had this good time credit rule. People were supposed to get credit for participating in certain programs, productive activities, to get credits towards religion, education, anything that the BOP deemed would make you a more productive member of society once released. The problem was that inmates were not getting actual time credit for the days that they were spending. The BOP had this formula that was not giving inmates full credit. Within the past few weeks, they realized, "Okay, we took all this feedback. We now understand that people are not getting the credit they deserve. We're going to change that and we're going to change that retroactively."

Because of this time that these people had built up, they were immediately released within a week. They had spent time in programs that the BOP was willing to give credit for and willing to give a full day of credit, even if they only participated in the program for, let's say, four hours that day. We had clients when we realized this was happening, and BOP can sometimes move slowly. So, what we were doing – and we're continuing to do – is writing letters to BOP. We put them on notice that we believe that our clients are now eligible for release because of the new time credits rule. Thankfully, BOP is reviewing these letters and seriously, letting our clients out.

They've also broadened what will be considered an eligible program. Before, it was very strict. Certain religious activity, certain educational classes and certain faith-based programs were not eligible. Now they really broadened that, and they included all of these programs. So, even if you think your client was not participating in a program that will get credit, it is absolutely worth asking counsel to write a letter to the warden and to BOP, and to re-examine that.

Adams: Similarly, I've seen in recent weeks the Elderly Offender Home Detention Program. What's that?

Kingman: If your client is over 60 years old and not serving a term of life imprisonment, is not a violent or sex offense and does not have a history of violence, they may be eligible for release. I've written a few of those letters just in the past few weeks requesting that BOP release our clients pursuant to the First Step Acts' Elderly Offender Home Detention Program. It's not just the First Step Act. There are other statutes that you want to make sure your counsel is aware of, that BOP has the discretion to release an inmate to be on home confinement.

Adams: Historically, when we think about modifications to sentencing, we think of Rule 35 of the Federal Rules of Criminal Procedure. The basis for correcting or reducing a sentence pursuant to Rule 35 is really narrow. What we've invited through these various mechanisms appears to be a very holistic look at the offense conduct and the offender, which is really what the sentencing process – at least in the federal system and in most states where I've practiced – is supposed to do in the first instance. It's supposed to look at the nature and characteristics of the offense and the offender and devise a sentence that's just and fair. That it is sufficient, but not greater than necessary, as 18 USC Section 3553 states, to further the goals of the sentencing commission and sentencing more generally. I hope we're moving to evolving our system of punishment to a more just and fair one.

We've unpacked a lot today, and I think the basic takeaway is that it's never too soon to think about early release. It has to shape not only a potential application post-conviction for relief, but also it has to shape the way that the sentencing process itself unfolds. These factors are things where you lay the groundwork in the early days of the case, and that includes right after learning of the charge.

I can't thank you enough, Marissa, for coming in and sharing your knowledge on this subject. I know that you are an invaluable member of our team when it comes to these issues and will continue to be. I encourage just about anyone, or even counsel, who may be out there thinking through some of the ways that these issues could be beneficial to get somebody home and in an environment more suitable than a correctional institution, to give you a call and to discuss these issues. A fresh set of eyes is always a good opportunity when it comes to these things in particular. Thank you very much.

That's all the time we have for today. We hope that you'll join us next time on “The Presumption of Innocence.” I'm your host, Matt Adams, one of the partners and co-chairs of our practice. We'll see you next time.