

**CRITERIA FOR EARLY RELEASE UNDER THE FIRST STEP ACT**  
**Peter Goldberger, Attorney, Ardmore PA – June 2019**

<b>Reduction in Sentence (“RIS”) for “extraordinary and compelling reasons” – 18 U.S.C. §3584(c)(1)(A) (a/k/a “Compassionate Release”), as amended by First Step Act § 603(b)</b>	<b>  Relaxed Eligibility for Home Confinement – 34 U.S.C. §60541(g), as amended by First Step Act § 603(a)</b>
---	--

<p>Power to grant RIS <u>lies with the sentencing court</u>, upon application of BOP, or of prisoner (once 30 days have passed since request for such relief is received by the Warden), if the judge finds a reduction in sentence to be “warranted” after considering the factors set forth in § 3553(a) “to the extent that they are applicable” and if “consistent with”USSC Policy Statement 1B1.13. A motion for RIS is “consistent with” USSG § 1B.13 (p.s.) if any of the following combinations of facts are present (<i>see</i> § 1B1.13, Appl. Note 1):</p>	<p>Power to grant home confinement <u>lies with BOP</u> as a form of transfer to a new “place of imprisonment.” Not subject to court review, except perhaps under 28 U.S.C. § 2241 (habeas corpus) if BOP denial is contrary to law. BOP criteria are found in Op.Mem. 001-2019 (April 4, 2019), to wit (<i>see Part II of this chart</i>)</p>
--	--

**PART I: Ten available grounds for court-ordered RIS:**

<b><u>Time Served</u></b>	<b><u>Age of Prisoner</u></b>	<b><u>Health Factor</u></b>	<b><u>Impact</u></b>
<b>1.</b> D/N/A*	D/N/A*	Terminal Illness**	D/N/A*
<b>2.a.</b> D/N/A*	D/N/A*	Serious medical or physical condition from which applicant is not expected to recover	That substantially diminishes ability to provide self-care in a correctional environment
<b>2.b.</b> D/N/A*	D/N/A*	Serious functional or cognitive impairment from which applicant is not expected to recover	That substantially diminishes ability to provide self-care in a correctional environment
<b>2.c.</b> D/N/A*	No minimum age, but “because of the aging process”	Experiencing deteriorating physical or mental health	That substantially diminishes ability to provide self-care in a correctional environment
<b>3.</b> At least 10 yrs or 75% of full term of imprisonment, whichever is <i>less</i>	At least 65 yrs old <u>and</u> “because of the aging process”	Experiencing serious deterioration in physical or mental health	D/N/A*

4. “Other reasons as determined by BOP”  
 – see BOP Prog.Smt. 5050.50 (1/17/2019), e.g.\*\*\* –

- |  |   |   |  |
|--|---|---|--|
| a. Served the greater of 10 yrs or 75% of sent imposed | 65 or older   | D/N/A*  | D/N/A*   |
| b. served at least 50% of the sentence                 | age 65 or older <u>and</u> “related to the aging process” | Chronic or serious medical conditions for which conventional treatment promises no substantial improvement <u>and</u> “deteriorating mental or physical health” | That substantially diminishes D’s ability to function in a correctional facility |
| c. served 30 yrs or more                               | age 70 or older   | D/N/A*  | D/N/A*   |

5. Family Circumstances:

- a. Death or incapacitation of caregiver of D’s minor child or children OR
- b. Incapacitation of D’s spouse or “registered partner” where D would be that person’s only remaining available caregiver.

**PART II: Criteria for BOP-ordered early home confinement program:**

- A. Health related (after first being considered for RIS recommendation):
  - 1.a. In need of nursing home, intermediate care facility, or assisted living; OR
  - b. Diagnosed with a terminal illness\*\* AND
  - 2. Not serving sentence for crime of violence, sex offense, or other excluded offense (the statute has a long list), nor has past conviction for, or history of, same
  - 3. Release to home confinement will result in a substantial net cost saving to federal government
- B. Age related (all of these are required):
  - 1. At least 60 years old
  - 2. Has served at least 2/3 of sentence imposed, and not serving life sentence.
  - 3. Not serving sentence for crime of violence, sex offense, or other excluded offense (the statute has a long list), nor has past conviction for, or history of, same
  - 4. Release to home confinement will result in a substantial net cost saving to federal government

NOTES:

General: (a) This outline does not and necessarily cannot include every detail or nuance of the cited rules and criteria, particularly as articulated in the cited BOP Program Statement and Operations Memorandum, and in the Application Notes to the cited Sentencing Commission Policy Statement.

(b) “Reduction in Sentence” (Part I of this outline) is potentially available without regard to what sort of sentence was initially imposed, including life sentences and mandatory sentences, and without regard to the nature of the offense of conviction. Early eligibility for home confinement (Part II of this outline), by contrast, is subject to extensive limitations based on type of offense or sentence.

\* “D/N/A” (“does not apply”), as used on this chart, indicates that this factor does not come into play among the eligibility criteria for this particular basis for RIS.

\*\* “Terminal illness” is a defined term under the First Step Act. *See* § 603(b)(3), creating new § 3582(d)(1). It does not require a stated minimum remaining life expectancy but rather only an illness or condition with an “end of life trajectory”

\*\*\* This outline omits various nuances and considerations that appear to the author to relate to BOP’s exercise of discretion as to whether to ask the USAO to file a RIS motion, rather than as imposing criteria or requirements (which might then restrict the exercise of a judge’s discretion). This was a subjective call. In addition, due to the BOP’s bureaucratic writing style, there are many interpretative questions about some of the BOP’s stated criteria which are not addressed in this outline; instead, the outline is based on the author’s good faith attempt to ascertain the intended meaning. Other, more aggressive and “defense-friendly” interpretations may be available. As to Category 4.b. (medical issues, over 65 y/o, 50% served), note that BOP Op. Mem. 002-2016 (March 25, 2016) offers helpful interpretations of the health factors.

CROSS-REFERENCES

**This Outline**

**Official Source**

<u>Part I:</u>	<u>USSG 1B1.13, appl. Note 1:</u>
1.	¶(A)(i)
2.a.	¶(A)(ii)(I)
2.b.	¶(A)(ii)(II)
2.c.	¶(A)(ii)(III)
3.	¶(B)
4.a.	¶(D) – incorporating BOP P.S. 5050.50 ¶4.c.
4.b.	¶(D) – incorporating BOP P.S. 5050.50 ¶4.b.
4.c.	¶(D) – incorporating BOP P.S. 5050.50 ¶4.a.
5.a	¶(C)(i)
5.b.	¶(C)(ii)
<u>Part II:</u>	<u>BOP Op.Mem. 001-2019:</u>
A.	¶2(e) (definition of “eligible terminally ill offender” for ¶2(b))
B.	¶2(e) (definition of “eligible elderly offender” for ¶2(b))