

# Special Exceptions under Cares: Risk and Rewards

*by Michael Santos  
July 2, 2022*



This article offers insight into the risks and rewards of requesting early transfer to Home Confinement under the authorities contained in the CARES Act. If a person applies too early, the person may find challenges that would not have existed if the person waited for the BOP Guidelines. Any person requesting placement under the CARES Act outside the BOP Guidelines should fully understand the complexities that follow.

## How did the CARES Act influence people in federal prison?

At the start of the COVID-19 Pandemic, President Trump signed the CARES Act. Invoking the CARES Act, the Attorney General authorized the director of the Bureau of Prisons to send more people to home confinement.

Leaders in the BOP published a series of memorandums that offered guidelines for staff to follow. Those guidelines required staff members to:

1. Review the person's institutional discipline history for the last twelve months (Staff could refer people who received 300 or 400 series incident reports, at the warden's discretion.);
2. Ensure the person has a verifiable release plan;
3. Verify the person does not have a history of violence, sex offense, or terrorism-related activities;
4. Confirm the person does not have a detainer;
5. Confirm the person meets the requirements for low or minimum security;
6. Confirm the person has a Low or Minimum PATTERN recidivism risk score;
7. Confirm the person has not engaged in violent or gang-related activity while incarcerated (must be reviewed by Special Investigative Services lieutenant—SIS);
8. Review the COVID-19 vulnerability of the inmate under Center for Disease Control and Prevention (CDC) guidelines; and

9. Confirm the person served 50% or more of their sentence; or has 18 months or less remaining on their sentence—and has served 25% or more of their sentence.

The guidelines empowered the warden in each institution to send people to home confinement. Thousands of people that met those requirements transitioned to home confinement. On the flip side, the BOP did not approve thousands of people who met the criteria; they may have had any number of individualized circumstances that made them unlikely candidates for home confinement.

Staff members in the BOP have enormous discretion over people serving federal sentences. Under the CARES Act, they can choose who remains in prison, and who transitions to home confinement.

When staff members don't help, BOP policy authorizes people to pursue relief through administrative remedy. If a person exhausts efforts through administrative remedy, The First Step Act authorizes people to file for relief from the sentencing judge.

People should anticipate the judge's response. The judge sentenced a person to the "custody of the attorney general." The attorney general gave the director of the BOP enormous discretion when it came to CARES Act. If the BOP declares a person ineligible for relief under CARES, the person has a high burden to cross in persuading a judge to grant relief. A person should think about develop a record that the judge will find "extraordinary and compelling." The adjustment record in prison, together with other factors, can move the judge to grant relief.

## **Exceptions to the Guidelines:**

The BOP's memorandums provide guidance to staff members. They also provide for the use of discretion in determining that a person may be appropriate for home confinement placement outside of the general guidelines.

Staff members could recommend a person transition to home confinement before the 25% or 50% rule, depending upon sentence length and time served. Some people transitioned to home confinement much earlier. People have transitioned to home confinement even though they had more than a decade remaining to serve.

## **What happens when a person requests an exception to the CARES Act guidelines?**

The BOP guidance memorandum for CARES provided instructions to BOP staff members in normal cases, and in exceptional cases. If a person did not meet the general guidance outlined in the memo, the BOP had a response.

If a person requests an exception—and the institution staff agree with the exception request—the local institution will forward the request to the Correctional Programs Division (CPD) in Washington DC. Administrators at the senior level will make an assessment.

For exception cases, the best outcome would be that leaders of the CPD would agree that the BOP should make an exception to the guidelines. If they make such an exception, the CPD will authorize the person to transfer to home confinement earlier than the guidelines suggest.

The worst case would be that leaders of the CPD decline the request. When they decline a request, the staff members will annotate the denial in the person's SENTRY database. That entry will remain with the person throughout the stay in the BOP.

SENTRY is the BOP's primary support database. Staff members routinely update SENTRY with information pertaining to the person's adjustment. To learn more about SENTRY, click the link that follows:

» [Learn about SENTRY](#)

## **What are the risks if the CPD determines not to grant an exception case?**

If the CPD does not authorize an exception, the person will remain in the BOP facility. When the person qualifies for CARES under the guidelines, per the bullet points I listed above, the local institution will consider the person for transition to home confinement under CARES.

Suppose the warden finds the person suitable for transition to home confinement. In that case, the warden will recommend the person to the appropriate Residential Reentry Manager (RRM—the role that oversees the RRC) will review the person's file.

If the RRM has the capacity to accept the person, the RRM will confirm a date to accept the person into the home confinement program under CARES.

The person's case manager in prison will notify the person of the transition date from prison to the RRC to conclude the remainder of the sentence on home confinement—overseen by staff members in the RRC.

### **Why it's a risk to request an exception to the guidelines for CARES:**

The warden of a local institution has the discretion to release a person that meets the BOP guidelines for CARES if a person:

- » meets the criteria,
- » if the warden makes the recommendation, and
- » if the RRM agrees, it's unlikely there would be further review.

But if a person requested an exception, the risk exists that the SENTRY database will flag the person's file. Leaders in the CPD may reassess whether relief on CARES is appropriate. Sometimes they will not act at all. However, sometimes the CPD will intervene and overrule the local institution.

In cases without exception requests, the CPD would not have reason to review SENTRY notes. According to resources we've consulted, it would be unlikely that the CPD would intervene in warden's decision to review a person's file—unless some external agency pressured the BOP.

For this reason, people should be cautious when considering applying for an exception to the BOP Guidelines.

### **Other Factors effecting Home Confinement Placement under the CARES Act:**

Many factors outside a person's control influence whether staff will recommend a person for home confinement. For example, a person wouldn't have any influence over the capacity of the RRC contractor. The RRC contractor must provide oversight of people on home confinement. According to our sources, several RRC contract providers have reported that the BOP is not paying invoices timely. Those untimely payments result in some contract providers not receiving reimbursements for almost a year.

The lack of payment severely hampers the capacity of RRCs to monitor more people on home confinement. Additionally, the Second Chance Act limits placement in an RRC to the final year of the sentence—unless they get relief under CARES Act.

The Second Chance Act influences the BOP's ability to place a person on home confinement. If staff members conclude that the home confinement address may not be viable, they may choose to leave the person in prison. Similarly, if it doesn't appear that the person has financial support from the home environment, they may choose not to grant a person relief.

Each person should inform family members that contract staff will visit the home before they make a recommendation. Those staff members will assess the home environment. They want to make sure the person will not have access to firearms, alcohol, or drugs. The family must express a willingness to support the person for the duration of home confinement.

If the BOP places a person on home confinement that exceeds one year under CARES, and the family says the person cannot reside there any longer, the BOP will send the person back to prison.

Each person should have a viable and well-structured release plan. The entire family must support the plan. Staff members will not view temporary living arrangements as a viable solution for a person requesting early transition to home confinement.

### **Recommendation:**

While serving time in prison, people may want to take the submarine approach to an adjustment.

- » Stay invisible, working toward the release date without becoming a neon light that attracts attention.
- » Keep the periscope up to stay aware of all that's happening around them.
- » Participate in programs that show a commitment to developing good critical-thinking skills that will facilitate a transition into society.
- » Document the journey with a journal, showing consistent preparations for a law-abiding, contributing life upon release.
- » Build a solid release plan, showing the efforts to build a support network.
- » Stay vigilant in keeping a blemish-free disciplinary record.
- » Accept that prison will bring frustrations and that each person must exercise discipline daily.
- » Be respectful of staff at all times, acknowledging that all staff members have enormous discretion over people in federal prison.

- » Remember that staff members will consider many factors when assessing a person's suitability for release under the CARES Act, including the judge's intention. If the judge knew about a person's medical history at sentencing, staff members may consider that the judge wanted the person to remain in BOP custody. If there is no change in medical condition, the risk of requesting an application for an exception to the guidelines may be much higher.

We attach two PDFs that show the unfortunate result of one person who attempted to request an exception case from the guidelines under CARES. The summary:

- » The person asked for an exception to the guidelines.
- » The CPD denied the request.
- » The person served the remainder of the time until he qualified for the BOP Guidelines.
- » The warden at the local institution and the RRM agreed to grant the person release.
- » The case manager issued the person a date to transfer from prison to home confinement.
- » The CPD reviewed SENTRY and intervened, pulling the date from the person.
- » The person remained in the BOP until he transferred to an RRC under Second Chance Act.
- » The person serves time in the halfway house rather than in home confinement.

Each person should consult with family, and perhaps competent counsel before deciding whether to apply for an exception to the BOP Guidelines for CARES Act relief. They should use all their critical-thinking skills when making decisions, and we hope this information helps.

### **Attached:**

- » Redacted letter showing how an attorney responded to the denial of placement for CARES Act placement.
- » Redacted letter showing how the BOP responded to the attorney's request for reconsideration.

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\* ADMITTED IN NY FLA AND D.C

April 27, 2022

[REDACTED].  
Acting General Counsel Central Office  
320 First Street, NW  
Washington D.C. 20534

*Re:* [REDACTED]

Dear Mr. [REDACTED]:

[REDACTED] fits squarely within the class of offenders the Attorney General and BOP Director directed be transferred pursuant to the CARES ACT to serve the remainder of their sentence on home confinement to mitigate the spread of COVID-19. Although both the facility warden (Warden [REDACTED]) and relevant RRM agreed with this assessment, the Correctional Programs Division (“CPD”) at Central Office refused to change the SENTRY code (entered after the previous denial), which is determinative of whether the offender in question satisfies the Attorney General and BOP Director’s stated criteria. According to CPD, [REDACTED] was denied because the court, at sentencing, found that he had a supervisory role in the offense and obstructed justice. This refusal is wrong, for several reasons.

First and foremost, the stated reasons are inconsistent with the most recent (April 13, 2021) BOP memorandum (discussed below), which reserves the “denial” SENTRY code for those who fall outside the BOP’s stated criteria. Neither a defendant’s role in the offense, nor a Guidelines adjustment for obstruction of justice is listed in this BOP memo as being among those factors that are disqualifying. Second, once an inmate has served 25% of his sentence and is otherwise qualified for release, the decision is the Warden’s to make, and the Warden’s discretion should not be pre-empted by a decision of CPD made prior to the time the inmate was fully qualified. Third, similarly situated offenders are eligible for other forms of early release pursuant to BOP regulations, namely RDAP and FSA Earned Time. For the reasons that follow, the SENTRY Code for denying [REDACTED] release should be deleted to



permit Warden ██████████ in conjunction with the facility staff and RRM, to exercise their discretion and transfer Mr. ██████████ to home confinement, both to protect Mr. ██████████ and to mitigate the spread of COVID-19 at FCI Ashland.

**Mr. ██████████ Meets the Criteria for CARES ACT Relief**

Both Warden ██████████ and RRM concluded Mr. ██████████ met the BOP criteria for home confinement. They were correct. The most recent BOP guidance of relevance was issued April 13, 2021 by ██████████, Assistant Director, Correctional Programs Division (the “██████████ Memorandum”). The ██████████ Memorandum “provides updated guidance and direction and supersedes the memorandum dated November 16, 2020.” Rather than providing a non-exhaustive list of criteria, the memo explicitly states that “[t]he following factors are to be assessed to ensure inmates are suitable for home confinement under the CARES Act”:

- Reviewing the inmate's institutional discipline history for the last twelve months (Inmates who have received a 300 or 400 series incident report in the past 12 months may be referred for placement on home confinement, if in the Warden's judgement such placement does not create an undue risk to the community);
- Ensuring the inmate has a verifiable release plan;
- Verifying the inmate's current or a prior offense is not violent, a sex offense, or terrorism-related;
- Confirming the inmate does not have a current detainer;
- Ensuring the inmate is Low or Minimum security;
- Ensuring the inmate has a Low or Minimum PATTERN recidivism risk score;
- Ensuring the inmate has not engaged in violent or gang-related activity while incarcerated (must be reviewed by SIS);
- Reviewing the COVID-19 vulnerability of the inmate, in accordance with CDC guidelines; and
- Confirming the inmate has served 50% or more of their sentence; or has 18 months or less remaining on their sentence and have served 25% or more of their sentence.

*See Exhibit A, Matevousian Memo, at 1-2.*

It is undisputed that Mr. ██████████ fits this criterion:

- He has no disciplinary infractions of any sort;

- He has a verifiable release plan;
- He has no prior offenses, and his current offense does not involve violence, sex, or terrorism;
- He is a minimum security inmate;
- His PATTERN score is Minimum;
- He has no ties to gangs, nor has he engaged in gang-related activity while incarcerated;
- He has seven comorbidities — age, 75 years old; obesity; prior cancer (colon cancer); PSA level is very high at 18+ indicating a heightened risk of developing prostate cancer; chronic lung diseases (chronic obstructive pulmonary disease and episodic acute bronchitis); stroke (having suffered 2 strokes; depression; substance use disorder (alcohol) — which are all recognized by the CDC to increase the risk of severe COVID-19 complications; and
- He has less than 18-months remaining on his sentence, for which he has thus far served 25%.

Additionally, Mr. ██████████ was at liberty on bail in this case, without issue, for three years and two months; this period included bail pending appeal. Mr. ██████████ was also permitted to self-surrender, which he did without issue. There is no reason to believe, therefore, that Mr. ██████████ poses any risk to the community if transferred to home confinement, the same place he resided during the pendency of his trial and appeal. Warden ██████████ and the RRM's decision to transfer Mr. ██████████ was consistent with the BOP guidance.

**CPD Erred in Pre-Empting the Warden's Discretion to Grant Relief**

Per the ██████████ Memorandum, the Warden “may forward the home confinement referral to the Correctional Programs Division [“CPD”] for further review” “[i]f the Warden determines there is a need to refer an inmate for placement in the community due to COVID-19 risk factors who is outside of the criteria listed above.” Exhibit A, at 3. Clear from this language is that the decision whether to grant release to those defendants who satisfy the factors listed in the ██████████ Memorandum belongs to the Warden, who engages the CPD only to seek review of an application on behalf of an inmate whose circumstances to do not satisfy the memorandum's criteria. Although the initial SENTRY entry was made by the CPD at a time when Mr. ██████████ had not yet met the criterion of having served 25% of his sentence, he logically should be in no worse position after he meets that criterion, and the Warden's authority to evaluate his suitability for release pursuant to the ██████████ Memorandum should be unencumbered by the CPD, which, consistent with the Warden's authority, should delete the prior entry.

Support for this conclusion is provided by that part of the [REDACTED] Memorandum that states, “If an inmate does not qualify for CARES Act home confinement under the above criteria, **they should be reviewed at the appropriate time** for placement in a Residential Reentry Center and/or home confinement consistent with applicable laws and BOP policies.” Exhibit A, [REDACTED] Memo, at 3 (emphasis added). Clear, therefore, is that the “denial” SENTRY Code is applicable only where the Warden believes the offender is ineligible under the applicable criteria. Indeed, when the “appropriate time” arrives — *i.e.* whenever the offender fits the criteria — the [REDACTED] Memorandum instructs that the offender should be reviewed in conjunction with the applicable factors, and the Warden permitted to forward the request to the RRM for a final determination as would normally occur for any other offender the Warden deems eligible.

Here, when Mr. [REDACTED] first applied to the Warden in XXX, his application, consistent with the [REDACTED] Memorandum, was forwarded to the Correctional Programs Division in Central Office because Mr. [REDACTED] had not yet served 25% of his sentence. *Cf.* Exhibit A, [REDACTED] Memo, at 1-2.<sup>1</sup> CPD denied the request on March 4, 2022, without providing a reason. When the only impediment to Mr. [REDACTED] fitting within the [REDACTED] Memorandum criteria was removed — *i.e.*, service of 25% — the time was “appropriate” for the Warden to send the recommendation directly to the RRM, which he did on or about April 15, 2022. Agreeing with the Warden, the RRM, on April 20, 2022, approved the transfer to home confinement, and advised Mr. [REDACTED] he would be transferred to home confinement on May 11, 2022.

Two days later, Mr. [REDACTED] was informed his release had been “revoked” by CPD. [REDACTED] told Mr. [REDACTED] the basis for the revocation was the initial March 4, 2022, CPD denial before Mr. [REDACTED] had reached his 25% time served. A review of the March 4, 2022, denial, signed by [REDACTED], states that CPD believes Mr. [REDACTED] ineligible under the CARES Act due to his role as “an organized-leader of obstruction of justice - percentage of time served is never a factor.”

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<sup>1</sup> Our understanding is that because Mr. [REDACTED], at the time of his initial application had not yet served 25% of his 21-month sentence, Warden [REDACTED] submitted Mr. [REDACTED] for consideration to the CPD due to his numerous health conditions (7 of 10 CDC COVID-19 risk factors including 2 strokes, CPD, age, obesity and cancer).”



to bill a campaign for expenses not exceeding \$150,000 should not be a disqualifier.

Nor is it a disqualifier in other contexts. Other BOP programs that allow for early release and exempt offenders with certain convictions do not exclude persons who receive a role adjustment for being organizers or leaders, or whose sentencing guidelines are increased for obstructing justice. For example, the Residential Drug Abuse Program, which allows inmates to receive one year off their sentence, excludes a large class of inmates, but not those deemed to have an aggravated role in the offense of conviction. *See* 28 CFR § 550.55(b). Indeed, if Mr. [REDACTED] enrolled in and completed RDAP, there is no question that he would be eligible for the year off. Likewise, Mr. [REDACTED], as a minimum-security inmate, has been determined by the BOP to be eligible for the maximum allotted time-off permitted by the FSA Earned Time program, and that program exempts an even larger class of offenders than RDAP.<sup>6</sup>

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The bottom line is that not only is CPD's refusal to change the SENTRY code inconsistent with BOP's own [REDACTED] Memorandum, the reasons for denying him release just doesn't hold weight. Deferring to the Warden and the RRM, additionally, is a sounder approach in making home confinement determinations considering they are the ones on the ground who interact with the offender and can best judge the specific needs of the offender and the facility. And, yet here, once Mr. [REDACTED] met the 25% criterion provided in the [REDACTED] Memorandum, and both the Warden and RRM agreed transferring him to home confinement would help protect Mr. [REDACTED] while simultaneously mitigating the spread of COVID-19 at FCI Ashland, CPD refused to change the code to permit Mr. [REDACTED]'s transfer.

Simply put, neither Warden [REDACTED] nor Mr. [REDACTED] should be penalized for the Warden's earlier decision to forward what can only be characterized as an emergency request to CPD to transfer Mr. [REDACTED] to home confinement. Yet, that is exactly what is happening here, since but for Warden [REDACTED] earlier emergency application to CPD, the Warden's subsequent recommendation, once Mr. [REDACTED] had served 25% of his sentence, would have gone to the RRM and would have been approved.

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<sup>6</sup> *See Disqualifying Offenses A list of offenses that would disqualify offenders from earning time credits*, Federal Bureau of Prisons, last viewed Apr. 27, 2022, available at [https://www.bop.gov/resources/fsa/time\\_credits\\_disqualifying\\_offenses.jsp](https://www.bop.gov/resources/fsa/time_credits_disqualifying_offenses.jsp)





U.S. Department of Justice

Federal Bureau of Prisons

██████████ Programs Division

Central Office  
320 First Street, N.W.  
Washington, DC 20534

May 5, 2022

██████████  
Attorneys at Law

████████████████████  
New York, New York 10038-1850

Dear Mr. ██████████,

Your letter addressed to ██████████, ██████████ General Counsel, Federal Bureau of Prisons, has been forwarded to me for response. You claim the recent decision by the ██████████ Programs Division to deny home confinement for inmate ██████████ ██████████, is inconsistent with guidance set forth by the United States Attorney General and the Director of the Bureau of Prisons. You indicate the Warden at the Federal Correctional Institution, ██████████, in conjunction with his staff and the respective Residential Reentry Manager, should be permitted to exercise their discretion and transfer Mr. ██████████ to home confinement, both to protect Mr. ██████████ and to mitigate the spread of COVID-19.

Pursuant to the authority granted by the Attorney General under the CARES Act and consistent with the guidance provided by the Attorney General in a memorandum dated March 26, 2020, Prioritization of Home Confinement as Appropriate in Response to COVID-19 Pandemic, Mr. ██████████ was recently assessed for placement on home confinement as a result of the COVID-19 pandemic. Following a thorough review, he was denied home confinement by the ██████████ Programs Division on March 4, 2022. In assessing Mr. ██████████ suitability for home confinement, numerous factors were taken into consideration. While non-exhaustive, some of the factors reviewed in this case involved the inmate's age; his vulnerability to COVID-19; the security level of the facility where the inmate is located; the inmate's conduct in prison; the inmate's PATTERN score; whether the inmate has a demonstrated and verifiable release plan; the inmate's crime of conviction;

and an assessment of the danger posed by the inmate to the community. While the Bureau has an obligation to protect staff and inmates in Bureau custody, we also have an obligation to protect the public. The BOP does the best we can to minimize the risk of COVID-19 to those in our custody, but it is imperative that, as an agency, we must also minimize the risk to the public.

As you outline in your letter to the General Counsel, Mr. [REDACTED] meets much of the criteria for home confinement consideration under the CARES Act. However, contrary to your claim, the [REDACTED] Programs Division has the authority to review Mr. [REDACTED] suitability for placement in home confinement, as the Warden determined there was a need to refer the case to the Correctional Programs Division for further review. This is consistent with the April 13, 2021, Bureau of Prisons memorandum which you reference. Specifically, the decision by this office to deny home confinement in Mr. [REDACTED] case is based on the totality of the circumstances involved. Of significance, the Court imposed the 21-month sentence on July 21, 2020, well into the COVID-19 pandemic. At that time, the Court was aware of Mr. [REDACTED] medical conditions and history as outlined in the PSR. The Court also permitted Mr. [REDACTED] to delay his voluntary surrender until November 30, 2021. Finally, it should be noted that Mr. [REDACTED] received an enhancement based on his organizer/leadership role of a criminal activity that involved five or more participants or was otherwise extensive. These factors, when considered together, demonstrate that Mr. [REDACTED] is not a suitable candidate for home confinement placement at this time.

Additionally, consistent with the Bureau's COVID-19 Pandemic Response Plan, the Federal Correctional [REDACTED] [REDACTED] is classified as Operational Level One, Minimal Modifications. This level is based on the facility's high vaccination rate (staff and inmates), the institution's low isolation rate, and the low rate of COVID-19 transmission in the local area.

Based on the factors as outlined above, the decision by the [REDACTED] Programs Division to deny Mr. [REDACTED] for home confinement under the CARES Act is appropriate. This decision does not prevent Mr. [REDACTED] from consideration for placement in a Residential Reentry Center through the respective Residential Reentry Management Office under the Second Chance Act. Of significance, his unit team is currently in the process of requesting the maximum amount of placement in a Residential Reentry Center possible, given his projected release date.



I trust this response has addressed your concerns.

Sincerely,



Assistant Director

RELEASE OF INFORMATION CONSENT CDFRM

U.S. DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF PRISONS

Not for use where consent is needed for participation in drug abuse programs or research projects, or for contact with news media. The appropriate form for each of these areas is to be substituted.

1. I (Name of Inmate) [REDACTED]	2. Register Number [REDACTED]
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3. Authorize (Person, Agency, Org.) Bureau of Prisons/Department of Justice	4. To disclose to (Recipients) Alison Grimes
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5. The following information: (Initial one that applies):

(a) For Community Programming: (To educational facilities, Social Agencies, prospective employers, etc.)

That I am currently in the custody of the U.S. Attorney General either serving sentence or under supervision of the U.S. Parole Commission or U.S. Probation Office and any and all information in my Inmate Central File except as indicated below:

n/a

\_\_\_\_\_  
(Initials)

(b) Other Objective (Specify Information)

I authorize the BOP/DOJ to fully disclose to recipient any and all information regarding my custody and decisions being made with respect thereto.

[REDACTED]  
\_\_\_\_\_  
(Initials)

6. Disclosure is made for the purpose of release options

7. I understand that I may revoke this consent in writing at any time except to the extent that disclosure has already been made based on that consent. In any event this consent ceases to be effective (Initial applicable):

(a) For Community Programming: Upon my release from supervis

[REDACTED]  
\_\_\_\_\_  
(Initials)

(b) Other Objective: (3 months from signature date)

