

The Pandemic's Effect on Criminal Law

By Adam Sheppard, CBA Record Editorial Board Member

Two main effects of the coronavirus on the practice of criminal law include a flurry of litigation (and now-favorable precedent) on motions for emergency bond and for compassionate release, and technological advances in criminal procedure.

Bond Motions & Compassionate Release

As has been well reported, the jails and prisons are hotbeds for infection. As of the date of the drafting of this article, the Cook County Department of Corrections was the largest single known source of infections in the United States. The federal Bureau of Prisons likewise has had a large number of positive cases.

The judiciary implemented measures on behalf of medically vulnerable inmates. Judge Leroy Martin, Jr., Presiding Judge of the Criminal Division, Cook County, ordered expedited bond hearings. In United States District Courts, not only have judges seemingly granted more bonds to pretrial detainees, they have more regularly delayed surrender dates (post-sentencing), and granted a significant number of emergency motions for compassionate release.

The federal CARES Act, passed in March – best known for the stimulus package – contains a provision that permits the Director of the Bureau of Prisons to transfer prisoners to home confinement much earlier than was previously the case if the Attorney General determines that “emergency conditions will materially affect the functioning of the Bureau.” See § 1203(b)(2). U.S. Attorney General Barr did so and issued memorandums regarding which prisoners should be considered for early release. Under the First Step Act, if the BOP denies a request for home confinement, prisoners can move for compassionate release in court. See 18 U.S.C. 3582(c)(1)(A)(i).

Under the First Step Act, courts can “reduce the term of imprisonment and 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.” 18 U.S.C. § 3582(c)(1)(A).” In other words, courts can order prisoners released to home confinement for the remainder of their prison term and add other conditions of supervised release that they deem fit. To do so, the court must find (1) the prisoner has exhausted his or her administrative remedies within the Bureau of Prisons; (2) “extraordinary and compelling reasons warrant” release (the courts have ruled that prisoners with underlying medical conditions which place them at a high risk for contracting severe COVID-19 constitutes an “extraordinary and compelling reason” for release); (3) the release is consistent with the Sentencing Commission’s policy statements, i.e., the defendant is not likely to be a danger to the safety of any other person or the community; and (4) the court must consider the sentencing factors outlined in 18 U.S.C. § 3553(a), such as the prisoner’s history and the nature and circumstances of the offense. See 18 U.S.C. § 3582(c)(1)(A); U.S.S.G. § 1B1.13. During the pandemic, federal courts across judicial districts have granted a large number of motions for compassionate release for medically vulnerable inmates.

Technology in the Courts

In Cook County, prior to the pandemic, e-filing was unavailable in the criminal division. The Clerk’s office has now implemented e-filing, at least for emergency bond motions and other select matters. Whether this procedure will remain in place once normal operations resume remains to be seen. Private criminal defense lawyers can also now remotely access the Cook County Clerk

of Court’s system on criminal cases. Previously, to check the next court date on a case, an attorney would personally have to go the Clerk’s office or call by phone. The system still does not allow the viewer to see scanned documents, but basic information is available.

Zoom hearings – particularly for bond hearings – have become standard practice during the closure period. Federally, the CARES Act authorized videoconferencing where it was previously unavailable. Section 15002 permits videoconferencing for a number of hearings, including change of plea hearings and sentencing hearings. The defendant must consent to the video conferencing and obtain judicial approval.

The MCC is now implementing videoconferencing. As of the date of this article, the MCC has six iPads provided by the federal Clerk’s office for videoconferencing. The Cook County Department of Corrections is also offering that option on its website.

“Necessity is the mother of invention,” and Chicago’s legal community and the legal community at large have risen to the task. We hope that when normal operations resume, open-mindedness towards pretrial release and compassionate release will continue. The continued use of videoconferencing will also increase efficiency in the criminal defense practice. ■



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