

Money for Nuthin' – Federal Court Rules Inmates Should Get Stimulus Checks
– LISA Newsletter for October 12, 2020

LISA publishes a free newsletter sent every Monday to inmate subscribers in the Federal system.

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DOING THE MONEY HUM

Years ago, I ran across some guys working a weird Ponzi scheme involving hot dog carts. To pump up their sales force in the morning, they would perform a ritual known as the “money hum.” They would crouch in a circle and all hum with increasing intensity, finally jumping up, fists in the air, shouting “Money!”

When I advised federal inmates last April that the CARES Act had been so shoddily and quickly written that it qualified them for the \$1,200 stimulus payment, I got some pushback. The IRS itself issued “guidance” in early May that inmates could not have the stimulus, and prisons receiving checks mailed to inmates were told to send them back. A number of commentators over the summer said what I was saying: the IRS had no basis and no right to issue such “guidance.” Nothing in the CARES Act authorized the IRS to write inmates out of the stimulus payment. Indeed, when pushed, the IRS could only lamely argue that prisoners cannot get social security benefits, so they should not get stimulus checks, either.

Out in California, a couple of inmates sued the IRS, and a few weeks ago, U.S. District Judge Phyllis Hamilton issued a 45-page preliminary injunction against the IRS, preventing it from denying stimulus payments to people because they were locked up.

A preliminary injunction does not mean the plaintiffs won, but it does mean the plaintiffs are likely to win. The court held that the CARES Act was pretty straightforward:

“The inquiry is whether incarcerated persons are eligible individuals. On this question, the statute is brief and to the point. Section 6428(d) states: ‘For purposes of this section, the term “eligible individual” means any individual other

than (1) any nonresident alien individual, (2) any individual with respect to whom a deduction under section 151 is allowable to another taxpayer for a taxable year beginning in the calendar year in which the individual's taxable year begins, and (3) an estate or trust.' There is no indication that Congress left the definition of "eligible individual" open-ended or otherwise up to the [IRS]'s discretion to change.

The judge said the IRS "went well beyond the 'bounds of its statutory authority'."

The district court ordered the government to send notices to all prisons that inmates were entitled to the money, and to send letters to each eligible inmate in its database by October. In a filing with the 9th Circuit on Friday, the government asked for an emergency stay of the individual letter requirement. It told the court that prisons have been notified, but that to require it to send letters by this coming Thursday would be impossible.

The IRS has, however, has moved the deadline for people who did not have to file tax returns (virtually all inmates) to file "non-filer statements" - which would qualify them for the \$1,200 stimulus payment - to November 21, 2020.

Meanwhile, the government has filed a second "protective appeal" to the 9th Circuit, which appears to be a placeholder of sorts designed to give officials time to decide if the agency will fight the ruling. "The decision whether to proceed with the appeal will be made by the acting solicitor general, who has not yet made a decision," the IRS said in a court filing last Monday.

Anyone wanting to file a "non-filer" statement can have his or her people on the street go to <https://www.irs.gov/coronavirus/non-filers-enter-payment-info-here>. The non-filer statement appears to be nothing more than a Form 1040 on which one shows he or she had too little income (under \$12,200).

Order Granting Motion for Preliminary Injunction and Motion for Class Certification, Scholl v. Mnuchin, Case No. 20-cv-05309, 2020 U.S. Dist. LEXIS 176870 (N.D.Cal. September 24, 2020)

IRS.gov, Economic Impact Payment Information Center — Topic A: EIP Eligibility and General Information (June 5, 2020)

KPIX-TV, IRS Tries To Claw Back COVID-19 Stimulus Checks Sent To Prison Inmates (June 24, 2020)

Forbes, IRS Must Pay \$100 Million Worth Of \$1,200 Stimulus Checks, Judge Orders In Prisoners' Lawsuit (October 6, 2020) (October 7, 2020)

CBS News, IRS extends deadline for 9 million people to register to get a stimulus check

The Independent, US judge: IRS can't keep coronavirus money from inmates (October 7, 2020)

Emergency Motion For Stay Of The District Court's October 7, 2020 Order Pending Appeal, Scholl v US, Case No. 20-16963 (9th Cir., filed Oct. 9, 2020)
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THE DEFINITION OF FUTILITY

People seeking compassionate release know that 18 USC 3582(c)(1)(A) requires that they exhaust administrative remedies first, that is, ask their warden to recommend that the Bureau of Prisons bring the motion on their behalf.

Many prisoners have asked courts to waive the exhaustion requirement as being futile. Courts have uniformly refused, ruling – like the 6th Circuit did last June in *US v Alam*, that the exhaustion requirement “ensures that the prison administrators can prioritize the most urgent claims. And it ensures that they can investigate the gravity of the conditions supporting compassionate release and the likelihood that the conditions will persist. These are not interests we should lightly dismiss...”

The courts' confidence in the BOP would be laughable if the stakes were not so high. A report last week from NBC and The Marshall Project underscores what attorneys, inmates, advocates and experts have long suspected: since March 1, wardens have denied or ignored over 98% of all compassionate release requests.

Of the 10,940 federal prisoners who applied for compassionate release in the first two months of the pandemic, from March through May, wardens approved 1.4%, or 156. Some wardens, including those at Seagoville and Oakdale, did not respond to any request during those two months, while others denied every request presented to them. Of the 156 approved by wardens, only 11 – one-tenth of one percent – were granted by Central Office.

A full 84.8% of the requests were denied by wardens. Another 13.7% were not even answered. In other words, a prisoner has a one-in-a-thousand chance that the BOP would approve a compassionate release request, about the same as an inmate's chance of dying from COVID-19 (0.09%). On the other hand, 16,000 people have received compassionate release from courts (slightly over 10% of the BOP population).

At Elkton, a COVID hot spot with over 900 cases, the warden denied 866 out of 867 compassionate release requests. At FCI Terminal Island, with 694 cases, the warden approved only five of 56 compassionate release requests filed between March and May.

A BOP spokesman told The Marshall Project that “the BOP has continued to process compassionate release requests as directed by the First Step Act and agency policy.”

US v Alam, 960 F.3d 831 (6th Cir. 2020)

NBC News/The Marshall Project, Thousands of Sick Federal Prisoners Sought Compassionate Release. 98% Were Denied. (Oct. 7)

Rochester, Minnesota, Post-Bulletin, Cases Continue in Federal Prison, Compassionate Release Hard to Get (Oct 9)

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HEY, FATSO! YOU’VE GOT COVID-19!

The Centers for Disease Control and Prevention cranked up its warning about obesity and COVID-19 last week. Last spring, if you had a BMI over 40 (6 feet tall and 295 lbs), you were at risk. At the end of June, that dropped to a BMI of 30+. That made a 6-foot tall guy weighing 221 lbs at risk.

Last week, the link between extra pounds and severe Covid-19 grew stronger as the CDC said that people who are merely overweight, not just the obese, may be at high risk of serious disease from the infection. Now, the risk starts with a BMI of 25. Besides the merely overweight (62% of America), smoking has been added to the risk-factor list.

The BOP, which has provided daily COVID-19 numbers since March 2020, eliminated weekend reports in late Sept. Last Friday, the agency didn’t bother to update its numbers from the day before. The latest report (from last Thursday) had 1,618 sick inmates, 719 sick staff, COVID-19 in 119 institutions (98% of all facilities) and 134 inmate deaths.

The latest to die was Tommy Sisk, a 62-year old Petersburg Medium inmate, who fell ill Sept 14 and died a week ago yesterday. Meanwhile, the news media reported COVID-19 increases at USP Allenwood, Petersburg Medium, Raybrook and McDowell.

In a pair of letters to Attorney General William P. Barr and BOP Director Michael Carvajal, Senators Elizabeth Warren (D-Massachusetts) and Richard Durbin (D-Illinois) suggest the Bureau’s response to COVID-19 is failing, and they question the BOP’s reliance on solitary confinement to isolate sick prisoners rather than granting compassionate release.

The Washington Post reported last week that “Federal prisoners, corrections staff, government inspectors and civil rights advocates have complained for months that the BOP’s strategies, when useful, are inconsistently applied. The

overall inadequate response is leaving a vulnerable population at risk of infection and creating major vectors for transmission more than seven months into the pandemic.”

The BOP’s COVID death toll “is mounting evidence that efforts to contain the virus within BOP facilities are failing,” Durbin Warren wrote to Barr and Carvajal in one of the Oct. 2 letters, which were viewed by The Washington Post.

The Post previously reported that prison staff have raised concerns about a lack of personal protective equipment and unsafe workplace conditions — issues that have prompted federal employees to sue the government. According to reports by the DOJ Office of the Inspector General on federal corrections facilities nationwide, persistent staffing shortage has triggered regular lockdowns during the pandemic in which prisoners aren’t allowed out of their cells, are often unable to shower and face more restrictions than if they were in solitary confinement.

Bloomberg, CDC Expands Covid Risk Warning to Include Overweight People (Oct 8)

CDC, People with Certain Medical Conditions (Oct 6)

BOP, Inmate Death at FCI Petersburg (Oct 5)

Harrisburg Patriot, Another big increase in COVID-19 cases at the Allenwood medium-security prison (Oct 5)

Roanoke Times, Inmate at federal prison in Petersburg dies of COVID-19; 21 others are infected (Oct 7)

Washington Post, Warren, Durbin slam government’s ‘failing’ efforts to contain coronavirus in federal prisons (Oct 5)

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NEW JERSEY DISTRICT COURT ORDERS BOP TO AWARD EARNED TIME CREDITS

An alert reader brought this case to my attention: On Aug 25, a US District Court in New Jersey granted a 28 USC 2241 habeas corpus petition brought by an inmate who had accumulated 240 days of earned time credit by taking approved courses. He claimed entitlement to the earned-time credits, which the BOP would not award.

The BOP claimed the First Step Act did not require it to award any earned time until January 2022, after the two-year phase-in of the earned-time program had ended. The court rejected this, holding it found “no evidence in the statutory framework for delaying application of incentives earned by all prisoners during

the phase-in program until January 15, 2022, the final date when BOP must complete the phase-in with respect to 'all prisoners.' Even the use of the words "all prisoners" indicates that all prisoners must be afforded the PATTERN program but does not exclude that some prisoners will participate in, earn incentives and complete the program before the end of the phase-in period.”

Goodman v. Ortiz, 2020 US Dist LEXIS 153874 (DNJ, Aug 25, 2020)

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