

Bill Cosby prosecutors have 10 days to respond to his bid to exit prison soon

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(Photo: Montgomery County Correctional Facility)

Prosecutors were given a deadline Tuesday to respond to Bill Cosby's legal bid to get out of a Pennsylvania prison as soon as possible while appealing his conviction on sex crimes.

Cosby's lawyers have petitioned the judge who sentenced him – the same judge they criticized as biased and unethical – to reconsider his [three-to-10-year sentence](#) ([/story/life/people/2018/09/25/bill-cosby-sentencing-day-2-testimony-ends-judge-issue-sentence/1417064002/](#)).

But this is only a preliminary step, trial experts say: [If Judge Steven O'Neill denies the motion Cosby's lawyers filed over the weekend](#) ([/story/life/2018/10/07/cosby-lawyers-ask-court-void-conviction-prison-sentence/1560254002/](#)) then the defense team will likely go over O'Neill's head to challenge the sentence to a three-judge panel of the state Superior Court.

If none of that gets [Inmate No. NN7687 out of SCI Phoenix prison](#) ([/story/life/tv/2018/10/02/bill-cosby-1st-week-prison-good-spirits-takes-daily-calls-wife/1497016002/](#)), quickly, then Cosby can launch a full-on appeal of his April conviction of three charges of aggravated sexual assault for drugging and molesting a woman at his home

outside Philadelphia in 2004.

On Tuesday, O'Neill [signed an order giving prosecutors 10 days](#) (<https://twitter.com/MontcoCourtNews/status/1049745717269532672>) to file a response to Cosby's motion. He did not indicate whether there would be a hearing. Kate Delano, a spokeswoman for Montgomery County District Attorney Kevin Steele, said his team is working on its response.

The motion was filed by appellate lawyer Peter Goldberger and Joseph Green, head of Cosby's third team of defense lawyers since his arrest in December 2015 on the charges.

Cosby, 81, nearly blind and ailing, asked O'Neill to hold a hearing and grant a new trial, or alternatively to vacate the sentence or modify it to allow Cosby to be bailed out of prison pending a full appeal of his conviction.

"This is a motion in the trial court asking for reconsideration of the sentence based on factors they've already raised, but it's a step that is commonly taken, to raise the (issue) of the appropriateness of the sentence," says Dennis McAndrews, a former Pennsylvania prosecutor who is now a criminal defense attorney in the state. "It's a preliminary step before going forward with an appeal."

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But trial experts doubt it will be granted by O'Neill, [who has already rejected multiple pre-sentencing motions by Cosby accusing him of being biased and unethical \(/story/life/people/2018/09/19/bill-cosby-judge-wont-recuse-himself-sentencing-proceed-monday/1361302002/\)](#) during two trials and seeking his recusal from the case and a new trial.

"The percentage of success in these types of motions to the trial court is low," says Stuart Slotnick, a New York defense attorney who has followed the Cosby case for nearly three years. "The bid to reduce the sentence will likely be rejected by the trial court and will only have a chance at success at an appellate court."

McAndrews agreed trial judges rarely change their minds after sentences are challenged, "especially in cases such as this when these issues were all considered so thoroughly," he said. "I would not expect this to be granted."

So why file it? Because Cosby's lawyers are "trying to make a record of their reasons why they think his sentence was excessive" for use later in a full appeal of the conviction, McAndrews said.

This is what defense lawyers do for clients post-conviction, says Lara Yeretsian, a Los Angeles criminal defense lawyer who has worked on other high-profile celebrity cases.

"Every little thing they can do for him they're going to do, especially now he is in custody," she says. "If there's a 1 percent chance this judge might overturn the conviction or reduce the sentence, it's worth a try. If he doesn't, they can take it up on appeal (later)."

Also, Cosby is arguing that he has "after-discovered evidence," meaning evidence that emerged after the trial. Cosby's lawyers argue that an audio recording played to jurors of a 2005 conversation between Cosby and the mother of accuser Andrea Constand was "not authentic." They said they did not make the discovery until an expert review after the trial.

Any claim of after-discovered evidence is "supposed to be raised as soon as possible" after sentencing, McAndrews said, thus the need to file a motion now.

And if it's true, "this could provide a significant opportunity to reverse the conviction" on appeal, adds Slotnick.

Cosby's latest motion is only 11 pages but it contains some previews of what are likely to be his arguments in a full appeal of his conviction to the state appellate court, known as the Superior Court in Pennsylvania.

The motion argues that prosecutors failed to prove that the encounter with Constand took place within the 12-year statute of limitations. It argues that O'Neill erred in declaring Cosby a "sexually violent predator" who must be imprisoned to protect the community. And they argue that the sentence was longer than necessary under the standard two- to three-year guideline range for the crime.

"The defense can appeal a sentence but whether an appellate court would agree that the judge abused his discretion in sentencing Cosby to three-to-10 years is another matter," says Yeretsian. She says O'Neill was careful to remain close to the upper end of the sentencing range but not exceed it.

"Clearly, Judge O'Neill played it safe by imposing the maximum sentence he could impose without being overturned," Yeretsian said.

Another argument: O'Neill "erred" in sentencing Cosby based on the testimony of five other accusers who testified at the second trial that Cosby sexually assaulted them, too. (O'Neill allowed only one such accuser of "uncharged crimes" to testify at the first trial, which ended in a hung jury.)

Cosby's motion cited what [O'Neill told Cosby during his sentencing \(/story/life/people/2018/09/26/prosecutor-says-accuser-andrea-constand-happy-cosby-sentence/1430100002/\)](#), that he considered "voices from the past, your past," and that he "heard their voices loud and clear."

"This use of the witnesses' testimony also violated (Cosby's) right at sentencing to cross-examine the witnesses against him," Cosby's motion argued.