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A DEFENDER'S GUIDE TO SENTENCING AND HABEAS ADVOCACY REGARDING BUREAU OF PRISONS ISSUES

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We have a complex relationship with the Bureau of Prisons (BOP). The agency is part of the prosecutive apparatus of the Department of Justice that, in broad policies and practices, often seems intent on increasing the time our clients serve. The BOP grudgingly administers, or fails entirely to implement, ameliorative sentencing statutes that Congress intended as mild counterweights to the harsh guidelines and mandatory minimum sentences that have radically increased the federal prison population.[1] At the same time, the BOP, entrusted with the health and safety of our clients while in custody, has implemented excellent rehabilitative programs, such as the residential drug abuse program (RDAP), while providing some of our clients with efficient and fair case management.[2] The goal of this Guide is to provide tools for sentencing advocacy to provide the easiest route to good results where the BOP acts reasonably and to provide ideas for litigation when it does not:

1) Anticipate BOP problems and attempt to achieve the best presentence report for your client;

2) Use ameliorative statutes to argue for sentencing concessions; and

3) Litigate against the BOP where, despite our efforts at the sentencing stage, the BOP executes the sentence in violation of sentencing statutes, administrative law, or the Constitution.

Our sentencing advocacy requires familiarity with the current practices of the BOP as well as the litigation history. The structure for this Guide involves several broad areas of recommended advocacy, including community corrections, RDAP, credit issues, and second look resentencing. We describe the relevant issue, review the litigation history, then suggest sentencing and post-sentencing strategies. We agree with Benjamin Franklin's adage: "An ounce of prevention is worth a pound of cure."

A. The Second Chance Act And Community Corrections Under 18 U.S.C. § 3624(c).

Since 2002, the BOP and prisoners have been engaged in a series of disputes regarding the agency's stinting utilization of community corrections. Under 18 U.S.C. § 3624(c), the agency is required to consider placement in halfway houses and home

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[1] *See generally Federal Bureau of Prisons Oversight: Hearing Before the Subcomm. on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. at 165-85 (2009) (statement of Stephen R. Sady, Chief Deputy Federal Public Defender, District of Oregon).

[2] *See* Federal Bureau of Prisons, *Federal Prison Residential Drug Treatment Reduces Substance Use And Arrests After Release* (2007) (RDAP reduces both relapse and recidivism in three-year study).

detention at the end of the prisoner's sentence. Under 18 U.S.C. § 3621(b), the BOP has authority to designate any "penal or correctional facility," which includes BOP halfway houses. In 2008, Congress decided to favor increased community corrections by doubling mandatory consideration of community corrections from six to twelve months in the Second Chance Act (SCA). Since then, little has changed: in violation of the SCA and the Administrative Procedure Act (APA), the BOP continues its policy of limiting community corrections to six months absent extraordinary circumstances. The background and history of the Second Chance Act and the BOP's unlawful administration of § 3624(c) is detailed in the petition for a writ of certiorari in *Sacora v. Thomas*, No. 10-10580,[3] and a recent law review article.[4]

1. History Of Community Corrections Litigation

Prior to December 2002, the BOP did not interpret § 3624(c) to limit its discretion under § 3621(b) to place prisoners at halfway houses at any time during the term of imprisonment.[5] The BOP guidelines for halfway house placement provided that prisoners could be directly designated to community corrections with a judicial recommendation; prisoners could be referred for up to 180-day pre-release placements, "with placement beyond 180 days highly unusual and only possible with extraordinary justification."[6]

In December 2002, in response to an Office of Legal Counsel memorandum purporting to construe the relevant statutes, the BOP abruptly reinterpreted its statutory authority to limit halfway house placement to the last 10 percent of the term, not to exceed six months, and to prohibit direct commitments. As a consequence, the BOP almost immediately began to limit its designations of prisoners to halfway houses to no more than the last 10 percent of their sentences, precluding all direct commitments as well. The BOP's revised rules were immediately and retroactively effective.

The OLC's flawed reinterpretation of the statute, and the BOP's consequent change in policy, resulted in a flurry of challenges to the BOP's actions, mostly involving direct commitment cases. Overwhelmingly, the courts granted relief, holding that, as a matter of

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[3] *Available at* http://or.fd.org/Case%20Documents/Sacora%202d%20Chance%20Act%20Cert%20Petition.pdf

[4] S. David Mitchell, *Impeding Reentry: Agency And Judicial Obstacles To Longer Halfway House Placements*, 16 MICH. J. RACE & L. 235 (2011).

[5] Program Statement 7310.04 at 4 (Dec. 16, 1998) *available at* http://www.bop.gov/policy/progstat/7310_004.pdf.

[6] *Id.*

statutory construction, the plain language of § 3621(b) authorized placement and transfer of offenders to halfway houses at any time during their terms of imprisonment.[7] The courts also held that, under § 3624(c), the BOP had an affirmative obligation to consider re-entry programming in the community, but was not limited in its discretion under § 3621(b) to transfer to a halfway house at any time.

The BOP responded to the courts' rejection of its revised statutory interpretation by perpetuating the six-month limitation, relying not on its interpretation of the statute, but on its purported discretion to create such categorical limitations.[8] As it had stated under its December 2002 policy, the BOP would designate prisoners to community confinement only "during the last ten percent of the prison sentence being served, not to exceed six months."[9] Most courts of appeal responded by invalidating the categorical limitation.[10] The Ninth and other Circuits invalidating the BOP rules held that § 3621(b) gives the agency discretion to place prisoners at any time during the term of imprisonment, but that discretion is "cabined by further mandatory direction to consider the five factors enumerated in the statute."[11] Accordingly, the categorical rule was invalid because the categorical exercise of discretion, based only on the length of the sentence remaining, foreclosed consideration of the enumerated factors.[12] Although the prisoners prevailed, the remedy was limited to directing the BOP to reconsider their requests for transfer after considering each of the enumerated factors. Not surprisingly, almost no prisoners received relief on remand to the agency.

2. The SCA And BOP Impunity

In April 2009, Congress passed the SCA, providing for mandatory consideration for pre-release placement of up to one year under § 3624(c) and reaffirming the BOP's discretion under § 3621(b) to place prisoners in community confinement at any time during the term

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[7] *See*, *e.g.*, *Goldings v. Winn*, 383 F.3d 17, 23-24 (1st Cir. 2004); *Elwood v. Jeter*, 386 F.3d 842, 846-47 (8th Cir. 2004).

[8] *Community Confinement*, 69 Fed. Reg. 51213-01 (Aug. 18, 2004).

[9] *Id.*

[10] *Compare Rodriguez v. Smith*, 541 F.3d 1180, 1184-87 (9th Cir. 2008); *Wedelstedt v. Wiley*, 477 F.3d 1160, 1166 (10th Cir. 2007); *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235, 250 (3d Cir. 2005); *Elwood*, 386 F.3d at 845-47; *Levine v. Apker,* 455 F.3d 71, 87 (2d Cir. 2006) *with Muniz v. Sabol*, 517 F.3d 29, 35-38 (1st Cir. 2008); *Miller v. Whitehead*, 527 F.3d 752, 757 (8th Cir. 2008).

[11] *Rodriguez*, 541 F.3d at 1186 (quoting *Wedelstedt*, 477 F.3d at 1165).

[12] *Rodriguez*, 541 F.3d at 1187.

of imprisonment. On April 14, 2009, five days after the SCA was signed into law, the BOP issued rules that purport to implement the SCA, but actually perpetuated the six-month limitation absent extraordinary circumstances. The April 14th Memorandum directed staff to continue to make pre-release decisions pursuant to the old rules, with certain "adjustments."[13] The adjustments involved advancing the decision-making process by a few months, making it theoretically possible for a 12-month placement, but perpetuated the presumptive limitation to only six months of pre-release placement, with required approval from both the Warden and the Regional Director for any deviation. Staff were also instructed to "approach every individual inmate's assessment with the understanding that he/she is now *eligible* for a maximum of 12 months pre-release RRC placement."

On November 14, 2009, the BOP issued another memorandum to provide guidance to BOP "staff for considering and responding to inmate requests for transfer to RRCs, when more than 12-months remain from their projected release date."[14] Staff were advised to avoid telling prisoners they were "ineligible" when responding to requests for transfer, but reminded staff that RRC's were for reentry purposes. The memorandum reiterated the six-month limitation, absent extraordinary circumstances.

In June 2010, the BOP issued yet another memorandum to guide pre-release placement decisions.[15] Regional approval is no longer necessary for placement recommendations longer than six months, but staff are reminded to consider the BOP's limited halfway house resources. The length of community confinement should be made based on an assessment of the prisoner's reentry needs: those with low risk of recidivism are to receive less halfway house time, but can be considered for earlier home confinement; higher risk prisoners should be considered for longer placements, provided that they have "demonstrated successful participation in or completion of programming opportunities," evidencing less need for reentry services. In short, the six-month norm continues for both higher and low risk offenders because they do not need extended reentry support.

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[13] Memorandum for Chief Executive Officers from Joyce K. Conley, Assistant Director, Correctional Programs Division, and Kathleen M. Kenney, Assistant Director, Office of General Counsel, titled "Pre-Release Residential Re-Entry Center Placements Following the Second Chance Act of 2007," April 14, 2008.

[14] Memorandum for Chief Executive Officers from Joyce K. Conley, Assistant Director, Correctional Programs Division, and Kathleen M. Kenney, Assistant Director, Office of General Counsel, titled "Inmate Requests for Transfer to Residential Reentry Centers," November14, 2008. "RRCs" are the new name for halfway houses – Residential Reentry Centers.

[15] Memorandum for Chief Executive Officers from Scott Dodrill, Assistant Director, Correctional Programs Division titled "Revised Guidance for Residential Reentry Center Placement," June 24, 2010.

With complete impunity to date, the BOP has violated Congress's directive to seek public input regarding the optimum length of time community corrections. The SCA expressly required that, within 90 days of enactment, the BOP promulgate regulations to ensure that the length of community corrections would be "of sufficient duration to provide the greatest likelihood of successful reintegration into the community."[16] Instead, the BOP maintained its old six month rule by its informal memoranda. When the BOP finally got around to issuing a regulation, 100 days after the congressional deadline, the rule said nothing about the optimum duration of community corrections. And as held by an Oregon district court, the inadequate and tardy regulation was invalid because the BOP violated the notice-and-comment requirements of the APA in promulgating the rule.[17]

The impunity is not inconsequential: there was no empirical data supporting the six-month limitation. In the Oregon litigation, the evidence disclosed that the Director of the BOP erroneously believed there were studies supporting the rule, but the BOP's own records established that no such studies exist:

- The Director claimed that "our research that we've done for many years reflects that many offenders who spend more than six months in a halfway house tend to do worse rather than better. The six months seems to be a limit for most of the folks, at which time if they go much beyond that, they tend to fail more often than offenders that serve up to six months."

- The BOP's research department could not back up the Director's claim, stating "I am trying to find out if there is any data to substantiate the length of time in a 'halfway house' placement is optimally x number of months. That is, was the '6-month' period literally one of tradition, or was there some data-driven or empirical basis for that time frame? . . . I've done a lot of searching of the literature, but so far have not found anything to confirm that the '6-months' was empirically based.

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[16] 18 U.S.C. § 3624(c)(6)(C).

[17] *Sacora v. Thomas*, 628 F.3d 1059, 1065 (9th Cir. 2010) (noting that the BOP did not appeal from the district court's grant of the petition with respect to the BOP's formal regulations, "finding that the BOP's failure to use notice-and-comment provisions in promulgating those regulations violated the APA, and enjoined the BOP from considering inmates for placement in RRCs pursuant to those regulations.").

Despite the BOP's violation of the APA and the SCA itself, the courts have to date deferred to the BOP's informal rules despite the invalidity of the regulation.[18]

Contrary to the judicial disinterest in SCA implementation, Congress has weighed in, directing the BOP to maximize community confinement.[19] On July 21, 2011, the Senate Judiciary Committee favorably reported the Second Chance Reauthorization Act, S. 1231, to the full Senate. In addition to authorizing funding for reentry programs, the bill would extend and expand a home detention program for elderly, nonviolent federal prisoners who meet strict criteria. The bill also includes a 7-day increase in good time for all prisoners and a 60-day increase in earned time credit for participation in recidivism reducing programs. If clients or family are interested in this and other legislation, you should consider referring them to Families Against Mandatory Minimums.[20]

3. Advocacy To Maximize Community Corrections

In the context of the BOP's recalcitrance, there are several considerations for sentencing advocacy. In some cases, we should ask the sentencing court for a judicial recommendation for the maximum period of community corrections. This is one of the factors the BOP is required to consider under § 3621(b), and may be the deciding factor favoring longer placement. You at least provide your client an edge when the BOP is deciding the length of time in community corrections.

Under the old system, the defender would be thinking about asking the judge to directly commit the client to community corrections, which is now a recommendation not likely to be followed. In such cases, the same goal can be accomplished through imposition of probation or a term of supervised release conditioned upon residence in a halfway house and home detention in a combination that accomplishes the same result as a direct commitment. By keeping it under the rubric of supervised release or probation, the judiciary, not the BOP, has control over the place of confinement.

One of the most important things that can be done prior to sentencing is to assure that any detainers are resolved prior to the commencement of the sentence. The existence of a

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[18] *See, e.g., Sacora*, 628 F.3d at 1067; *Izzo v. Wiley*, 620 F.3d 1257, 1261 (10th Cir. 2010); *Miller*, 527 F.3d at 758.

[19] *Conf. Rep. to Consolidated Appropriations Act of 2010*, 155 CONG. REC. H13631-03, at H13887 (daily ed. Dec. 8, 2009), Pub. L. 111-117, 123 Stat. 3034 (Dec. 16, 2009).

[20] FAMM National Office, 1612 K Street NW, Suite 700, Washington, D.C. 20006, (202) 822-6700, http://www.famm.org/.

detainer not only forecloses any time in community corrections, but it also prevents the prisoner from successfully completing the RDAP program and consequent eligibility for a sentence reduction of up to one year. To the extent that health issues militate in favor of a greater period of community corrections, where the defendant can receive treatment and support in the community, those health issues should be thoroughly documented in the presentence report and, if the trial court is willing, articulated as a supporting reason for the maximum time in community corrections.

There is also a risky strategy that might provide a good reason for a judge to impose a lower sentence in a close case. We can argue to the court that, because the BOP is not implementing the SCA as intended, and that the "kinds of sentences available" do not really include the full amount of community corrections, the court should take the stinting use of community corrections into consideration in imposing a lower sentence, with a period of halfway house and home detention as a condition of supervised release. The downside to this tactic is that the BOP has a rule that, in violation of the statute, states that persons with halfway house conditions of supervised release should not be referred to community corrections:

> A number of factors must be weighed to determine the length of CCC placement for inmates, including their individual needs and existing community resources. Ordinarily, inmates with shorter sentences do not require maximum CCC placement due to reduced transition needs. Additionally, *inmates who are required to spend a portion of time in a CCC as a condition of release (i.e. supervised release* or court order) *do not require an extended Bureau CCC placement*. For example, *if the Unit Team determines the inmate needs a six month CCC placement, but the inmate is required to stay in a CCC for 90 days as a condition of release, then the institution shall ordinarily refer the inmate for a 60-90 day CCC placement*.[21]

This policy is based on a legal error: the BOP assumes that the sentencing judge imposed the halfway house condition for punitive purposes, which is contrary to the rehabilitative purpose of the supervised release statute. Under the statute, Congress listed the factors the sentencing court should consider in determining the conditions of supervised release in 18 U.S.C. § 3583(c). Congress listed selected subsections of § 3553, omitting the retributive factor, "to reflect the seriousness of the crime . . . and to provide "just punishment for the

[21] Program Statement 7310.04 at 7 (emphasis added).

offense."[22] Nevertheless, the risk is that our client does not receive a sentence reduction commensurate with the loss of time in community corrections from the BOP.

B. The Sentence Reduction For Successful Completion Of The Residential Drug Abuse Program Under 18 U.S.C. § 3621(e).

In 1990, Congress mandated appropriate substance abuse treatment "for each prisoner the BOP determines has a treatable condition of substance addiction or abuse," including prison residential treatment lasting between six and twelve months.[23] In 1994, Congress, recognizing prisoners' general unwillingness to volunteer for such treatment, created an incentive to encourage federal prisoners to participate in RDAP, authorizing reduction of incarceration of up to one year for prisoners "convicted of a nonviolent offense" who successfully completed the program.[24] The amendment directed that residential treatment be available "for all eligible prisoners by the end of fiscal year 1997 and thereafter."[25] So all "eligible prisoners" – those with substance abuse problems and willing to participate – must have the residential program available, but only nonviolent offenders under § 3621(e) are eligible for the sentence reduction.[26]

The BOP proceeded to promulgate various rules limiting the availability of this sentence reduction, which has generated hundreds of federal cases. The history of this litigation provides the context for advice and approaches to present litigation.

1. History Of RDAP Litigation

The litigation regarding RDAP began in 1995, when two prisoners – one convicted of being a felon in possession of a firearm and the other convicted of a drug offense with a two-point gun bump – challenged their exclusion from the category of persons convicted of a non-violent offense who qualified for the one year sentence reduction under § 3621(e). The litigation has spanned statutory construction, administrative law, and retroactivity challenges.

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[22] *Compare* 18 U.S.C. § 3553(a)(2)(A) *with* 18 U.S.C. § 3583(c) (skipping from § 3553(a)(1) to § 3553(a)(2)(B)).

[23] 18 U.S.C. §§ 3621(b) and (e).

[24] 18 U.S.C. § 3621(e)(2)(B).

[25] 18 U.S.C. § 3621(e)(1)(C).

[26] 18 U.S.C. § 3621(e)(5)(B).

- First wave definition of "crime of violence": The initial BOP regulation defined non-violent offense as anything that was not a crime of violence under 18 U.S.C. § 924(c). However, the program statements implementing the regulation included felon in possession of a firearm (18 U.S.C. § 922(g)) and drug possession with a gun bump (U.S.S.G. 2D1.1(b)(1)) as "crimes of violence." The initial decisions in the District of Oregon, affirmed by the Ninth Circuit, invalidated the program statements because mere gun possession is not categorically a "crime of violence."[27] The circuits split, with the majority following the Ninth Circuit.[28]

- Second wave retroactivity: In October 1997, the BOP promulgated rules – effective immediately – that purported to exclude the § 922(g) and gun bump prisoners based on the BOP's discretion. The BOP attempted to apply the rules retroactively. In an earlier case, the Ninth Circuit held in *Cort v. Crabtree*, that a new disqualification of unarmed bank robbers could not apply retroactively to prisoners participating in the program as eligible for the § 3621(e) sentence reduction.[29] The Ninth Circuit followed *Cort* in determining that the October 1997 rules could not be retroactively applied after a positive eligibility determination.[30] The ban on retroactivity has been applied to subsequent rule changes in the Ninth Circuit, and the BOP limited retroactivity in its March 2009 rules.[31] Several circuits have rejected the Ninth Circuit's retroactivity jurisprudence.[32]

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[27] *Downey v. Crabtree*, 923 F.Supp. 164, 165 (D. Or. 1996), *aff'd*, 100 F.3d 662 (9th Cir. 1996); *Davis v. Crabtree*, 923 F.Supp. 166, 166-67 (D. Or. 1996), *aff'd*, 109 F.3d 566 (9th Cir. 1997).

[28] *Compare Orr v. Hawk,* 156 F.3d 651, 654-56 (6th Cir. 1998); *Martin v. Gerlinski*, 133 F.3d 1076, 1080 (8th Cir. 1998); *Royce v. Hahn*, 151 F.3d 116, 124 (3d Cir. 1998); *Fristoe v. Thompson*, 144 F.3d 627, 631 (10th Cir. 1998), *with Cook v. Wiley*, 208 F.3d 1314, 1322 (11th Cir. 2000); *Pelissero v. Thompson*, 170 F.3d 442, 447-48 (4th Cir. 1999); *Parsons v. Pitzer*, 149 F.3d 734, 736-38 (7th Cir. 1998); *Venegas v. Henman*, 126 F.3d 760, 763-65 (5th Cir. 1997).

[29] 113 F.3d 1081, 1086 (9th Cir. 1997).

[30] *Bowen v. Hood*, 202 F.3d 1211, 1221-22 (9th Cir. 2000).

[31] *Smith v. Thomas*, 2010 WL 286766, *3 (D. Or. Jan. 10, 2010); Program Statement 5331.02 (Mar. 16, 2009), *available at* http://www.bop.gov/policy/progstat/5331_002.pdf.

[32] *See, e.g., Royal v. Tombone*, 141 F.3d 596, 601-02 (5th Cir. 1998); *Zacher v. Tippy,* 202 F.3d 1039, 1045 (8th Cir. 2000); *Orr v. Hawk,* 156 F.3d 651, 653-54 (6th Cir. 1998).

- Third wave statutory challenges: The next challenges to prospective application of the October 1997 regulation asserted that the regulation was inconsistent with the underlying sentence reduction statute.[33] Once more the circuits split.[34] This time the BOP petitioned for certiorari and won a 6-3 reversal in *Lopez v. Davis*.[35]

- Fourth wave notice-and-comment under § 553(b) of the APA: The *Lopez* case, unlike the Ninth Circuit in *Bowen*, did not involve a parallel challenge to the promulgation of the rule under the Administrative Procedure Act (APA). In response to the NACDL amicus brief, the Supreme Court noted in *Lopez* that the APA challenge remained unresolved.[36] After several generations of procedural litigation, the Ninth Circuit in *Paulsen v. Daniels*, finally reached the merits and invalidated the interim October 1997 rule for violation of § 553(b) of the APA, which requires that the public have an opportunity for notice and comment before a rule becomes effective.[37]

- Fifth wave arbitrary-and-capricious review for gun possession under § 706 of the APA: After *Paulsen* invalidated the October 1997 interim rule, gun possessors were again eligible for the § 3621(e) sentence reduction until the BOP promulgated the final rule in 2000. In doing so, the BOP provided virtually nothing in the administrative record to justify the exclusion. Prisoners challenged the final regulation under § 706 of the APA, which invalidates administrative rules that are "arbitrary, capricious, an abuse of discretion, or not in accordance with law." The Ninth Circuit agreed in

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[33] *Gavis v. Crabtree*, 28 F.Supp.2d 1264, 1267 (D. Or. 1998), *rev'd*, *Bowen*, 202 F.3d at 1217.

[34] *Compare Bowen*, 202 F.3d at 1221-22; *Bellis v. Davis*, 186 F.3d 1092, 1095 (8th Cir. 1999), *with Ward v. Booker*, 202 F.3d 1249, 1257 (10th Cir. 2000); *Kilpatrick v. Houston*, 197 F.3d 1134, 1134 (11th Cir. 1999).

[35] 531 U.S. 230 (2011) (the BOP had statutory discretion to narrow classes of prisoners eligible for the sentence reduction).

[36] 531 U.S. at 244 n. 6.

[37] 413 F.3d 999, 1004-05 (9th Cir. 2005).

Arrington v. Daniels, holding the final rule violated § 706,[38] while other circuits rejected the argument.[39]

- Sixth wave arbitrary-and-capricious review under § 706 of the APA for prior convictions: The BOP's disqualification based on prior convictions, such as murder, rape, aggravated assault and child sex offense, of prisoners statutorily eligible for the § 3621(e) sentence reduction followed a similar trajectory as for gun possessors. As in *Bowen* and *Lopez*, the court upheld the BOP's statutory authority to exclude classes of eligible prisoners based on prior convictions.[40] As in *Arrington*, the court held that the administrative record fell far short of § 706's requirements, thereby rendering the rule invalid.[41]

2. Gun Possessors And Prior Convictions

The seventh wave of review addresses the BOP's March 2009 rules, which once again—with minimal justification—categorically disqualify gun possessors and persons with certain prior convictions from eligibility for the § 3621(e) sentence reduction. The current litigation focuses on the BOP's failure once again to articulate evidence-based, neutral, and persuasive reasoning in support of the gun possession and prior conviction exclusions. The § 706 challenge demonstrates the importance of history: the BOP has continued to claim gun possession is categorically a "crime of violence," failed to gather data for the hundreds, if not thousands, of prisoners deemed eligible pursuant to Operations Memorandums implementing prisoner wins, and ignored the list of characteristics of valid rule-making identified by Judge Rawlinson in *Crickon*. To date, the new rules have been upheld; the lead petitioners filed their opening brief in the Ninth Circuit on August 1, 2011.[42]

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[38] 516 F.3d 1106, 1116 (9th Cir. 2008).

[39] *Gatewood v. Outlaw*, 560 F.3d 843, 847-48 (8th Cir. 2009); *Handley v. Chapman*, 587 F.3d 273, 282 (5th Cir. 2009), *cert. denied,* 131 S. Ct. 71 (2010); *Gardner v. Grandolsky*, 585 F.3d 786, 792 (3d Cir. 2009).

[40] *Jacks v. Crabtree*, 114 F.3d 983, 986 (9th Cir. 1997); *accord Stiver v. Meko*, 130 F.3d 574, 577 (3d Cir. 1997); *Wottlin v. Fleming*, 136 F.3d 1032, 1036 (5th Cir. 1998); *Martinez v. Flowers*, 164 F.3d 1257, 1260 (10th Cir. 1998).

[41] *Crickon v. Thomas*, 579 F.3d 978, 988-89 (9th Cir. 2008).

[42] *Peck v. Thomas*, No. CA 11-35283, *available at* http://or.fd.org/Case%20Documents/Peck%20AOB.pdf.

3. Alien Prisoners And Others With Detainers

Nothing in the statute ties successful completion of RDAP to participation in community corrections. In fact, as initially promulgated in 1995, the BOP's rules specifically provided for eligibility for all persons who successfully completed the residential program and then succeeded in *either* community corrections *or* transitional programming within the institution.[43] This meant that prisoners with immigration and other detainers could receive the year off, which makes good sense. Their successful treatment would help them live law-abiding lives in their own countries, while not saddling neighboring countries with untreated substance abusers. Moreover, there is no purpose to imposing disproportionately longer sentences on aliens with substance abuse problems than American citizens for similar conduct. This sensible program tragically changed due to a classic case of unintended consequences.

In the original 1995 rules, the follow-up after the residential treatment called for only one session every month.[44] The American Psychological Association wrote the BOP a letter suggesting that the treatment sessions should be more frequent.[45] In response, the BOP promulgated a new rule in 1996 that included a requirement that, to successfully complete the program, the prisoner had to complete community corrections.[46] With no indication that any thought was given to prisoners with detainers who are ineligible for community placement, and certainly no indication that the BOP intended to bar aliens, the new rule in effect eliminated all aliens, as well as United States citizen prisoners with state detainers, from successfully completing the program and, consequently, from early release eligibility.

Prisoners initially argued that, as a matter of statutory construction, the BOP lacked authority to create a categorical disqualification based on detainers. This approach was not successful.[47] However, in June 2000, the American Psychological Association reacted with alarm when it realized for the first time that its comment had been used to justify elimination of 26.6% of the federal prison population – those with immigration detainers – from consideration for the sentence reduction incentive. The American Psychological Association provided a new comment to the BOP objecting to the misuse of the prior comment and

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[43] Bureau of Prisons Program Statement 5330.10, ch. 5 at p. 2 (May 25, 1995).

[44] 28 C.F.R. § 550.59(a) (1995).

[45] Drug Abuse Treatment Programs: Early Release Considerations, 61 Fed. Reg. 25, 121 (May 17, 1996).

[46] *Id*.

[47] *McLean v. Crabtree*, 173 F.3d 1176 (9th Cir. 1999).

providing strong reasons why such eligibility should continue.[48] Nonetheless, the BOP refused to modify its position.[49] In fact, the BOP has recently determined that prisoners with detainers are ineligible for both the RDAP program and the sentence reduction.[50]

For our alien clients, several obvious issues jump out. We can argue that the ineligibility for a sentence reduction based on immigration status should result in a lower sentence.[51] In habeas corpus, the BOP alien-exclusion rule is arbitrary and capricious under § 706 based on the APA letters and violated § 553(b) because no notice of the effect on aliens was provided, so no comments could be made. Lastly, the recent exclusion of aliens from residential treatment violates the plain language of the statute that makes availability of appropriate treatment mandatory.[52] The statute plainly requires that residential treatment be available for all eligible prisoners,[53] and "eligible prisoner" means only that the prisoner has a substance abuse problem and is willing to participate, with no other requirement.[54]

Excluding all prisoners with immigration detainers from an immensely beneficial and cost-saving program based on the misinterpretation of the position of the American Psychological Association deprives the United States and the returning prisoners' home countries the benefits of lowered recidivism and drug-free lifestyles. The cost-savings of allowing over a quarter of the prison population to be potentially eligible for the one year sentence reduction is obvious. The RDAP program should be open to all prisoners who need substance abuse treatment.[55]

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[48] Drug Abuse Treatment and Intensive Confinement Center Programs: Early Release Consideration, 65 Fed. Reg. 80745, 80746-47 (Dec. 22, 2000).

[49] *Id*. at 80745.

[50] 28 C.F.R. § 550.53 (2.5.1)((b)(3) (Mar. 16, 2009); Program Statement 5330.11 § 2.5.1(b)(3) (Mar. 16, 2009).

[51] *United States v. Camejo*, 333 F.3d 669, 677 (6th Cir. 2003); *United States v. Lopez-Salas*, 266 F.3d 842, 850 (8th Cir. 2001); *United States v. Maldonado*, 242 F.3d 1, 5 (1st Cir. 2001); *United States v. Farouil*, 124 F.3d 838, 847 (7th Cir. 1997); *United States v. Cubillos*, 91 F.3d 1342, 1344 (9th Cir. 1996).

[52] 18 U.S.C. § 3621(b).

[53] 18 U.S.C. § 3621(e)(1)(C).

[54] 18 U.S.C. § 3621(e)(5)(B).

[55] *See generally* Nora V. Demleitner, *Terms of Imprisonment: Treating the Noncitizen Offender Equally*, 21 Federal Sentencing Reporter 174 (2009).

4. Other RDAP Issues

There are a few other considerations that should be addressed at sentencing that can affect a client's ability to participate in RDAP and receive a sentence reduction. The first is the BOP's requirement that the presentence report indicate substance abuse within the year prior to arrest.[56] The rule is premised on the DSM-IV, which considers people who have not abused for a year to be in remission and, therefore, no longer in need of treatment. The presentence report should include the client's history of substance abuse because the BOP has not readily accepted alternative proof of abuse, even from treatment providers.

Although Congress has directed the BOP to maximize sentence reduction opportunities,[57] the BOP has administered the program in such a manner that rarely are prisoners awarded a full year off – the average reduction is now about 8 months. The problem stems from delays when a prisoner will be considered for RDAP (24 months prior to the projected release date not counting the potential year reduction) and the policy of admitting prisoners into RDAP without regard to their eligibility for early release. Prisoners who are not eligible for the reduction fill RDAP slots and delay entry for eligible prisoners, who then complete the program too late to realize the full benefit, even though the statute clearly provides that priority for placement shall be based on "proximity to release."[58] Voluntary surrender should improve the timely participation to maximize the available sentence reduction. However, in light of *Tapia v. United States*, we should continue to object to lengthening of sentences for the rehabilitative purpose of accommodating RDAP.[59]

Although RDAP participation is voluntary,[60] and a court recommendation is not binding, the BOP will now sanction prisoners who refuse or withdraw from RDAP if the

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[56] *Mora-Meraz v. Thomas*, 601 F.3d 933, 942 (9th Cir. 2010); *see also Standifer v. Ledezma*, 2011 WL 3487-74, *2 (10th Cir. Aug. 10, 2011) (finding the 12-month rule reasonable).

[57] *Conf. Rep. to Consolidated Appropriations Act of 2010*, 155 CONG. REC. H13631-03, at H13887 (daily ed. Dec. 8, 2009), Pub. L. 111-117, 123 Stat. 3034 (Dec. 16, 2009).

[58] *Close v. Thomas*, 2011 WL 3319547, *3 (9th Cir. Aug. 3, 2011) (after denying relief, noting "that BOP's administration of RDAP, combined with the program's insufficient capacity, has created a troubling situation that calls for a legislative or regulatory remedy. . . . [T]he current system 'results in a significant diminution or the outright elimination of the statutorily created incentive of sentence reductions for prisoners who seek and complete RDAP.'") (citation omitted).

[59] 131 S. Ct. 2382, 2392 (2011)(rejecting increased sentences to provide time for participation in RDAP).

[60] 18 U.S.C. § 3621(e)(5)(B)(ii).

court or the staff recommended RDAP. The sanctions include loss of furlough privileges, lowest pay, no UNICOR jobs and shorter halfway house placement.[61] We need to balance the assistance to RDAP placement of a recommendation against the risk the client has a change of heart.

Finally, clients should be aware that a disciplinary transfer from the halfway house to the institution will result in the forfeiture of any early release awarded, in addition to the loss of good time. This is so even if the discipline did not involve the use of drugs or alcohol.

C. Federal Boot Camp Program Under 18 U.S.C. § 4046

In 1990, Congress passed a statute authorizing the creation of a boot camp program with incentives available for successful completion.[62] The BOP, following the statutory direction that the program be available to nonviolent offenders with minor criminal histories, put into place two boot camps for men and one for women.[63] In 1996, through formal rulemaking procedures, the BOP institutionalized incentives that included, for nonviolent prisoners sentenced to no more than 30 months incarceration, a sentence reduction of up to six months and an extension of community corrections by over a year.[64] For prisoners with sentences between 30 and 60 months, boot camp eligibility provided extended community corrections, but not the sentence reduction.[65]

The federal boot camp program was well received by almost all participants in the federal system. The Sentencing Commission promulgated a guideline addressing it under the Sentencing Options chapter.[66] In addition to providing programming that, anecdotally, assisted many defendants in developing the discipline and skills needed to maintain employment and a crime-free life, minor offenders who did not need 30 months of incarceration had available a sentencing option that would reduce the actual separation from family, employment, and community by six months, coupled with heightened supervision under the community corrections program. In 1996, a study of the Lewisburg federal boot

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[61] 28 C.F.R. § 550.53(h).

[62] 18 U.S.C. § 4046 (2000).

[63] Bureau of Prisons Operations Memorandum 174-90 (Nov. 20, 1990).

[64] 28 C.F.R. § 524.30 (1996).

[65] 28 C.F.R. § 524.30 (1996).

[66] U.S.S.G. § 5F1.7.

camp for women concluded that the program was effective both in providing skills and lowering recidivism.[67]

In January 2005, the BOP unilaterally terminated the federal boot camp program.[68] The Director of the BOP sent a memorandum to federal judges, prosecutors, probation officers, and federal defenders stating that, due to budget constraints and supposed studies showing the program was not effective, the program was being eliminated, effective immediately.[69] In subsequent litigation, these representations turned out to be questionable: the BOP's assistant director over research and evaluation testified that no new studies had been conducted regarding the efficacy of the federal boot camp program; the state studies did not address federal boot camps, with their limitations on eligibility and required followup in community corrections; and the change went into effect with little internal discussion.

The Ninth Circuit upheld the BOP's unilateral termination of boot camp, noting that the statute and Guidelines were still theoretically available.[70] In the immediate wake of the termination, some judges resentenced prisoners creatively in a manner we can still use. Based on the "kinds" of available sentences under 18 U.S.C. § 3553(a)(4), we can argue for variances for boot camp eligible defendants—nonviolent with little or no criminal history – to substitute, for example, for a 30 month sentence, a sentence to six months in prison followed by six months in a halfway house and six months home confinement as conditions of supervision. The conditions in the community could include community service or vocational training to approximate a boot camp disposition. For boot camp eligible prisoners, Congress and the Commission have already found that less time behind walls is sufficient but not greater than necessary to accomplish the goals of sentencing.[71]

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[67] 1996 Lewisburg ICC Evaluation, Federal Bureau of Prisons (1996).

[68] Message from Harley G. Lappin, Director, Federal Bureau of Prisons, to all staff (Jan. 5, 2005).

[69] Memorandum from Harley G. Lappin, Director, Federal Bureau of Prisons, to Federal Judges, United States Probation Officers, Federal Public Defenders and United States Attorneys (Jan. 14, 2005).

[70] *Serrato v. Clark*, 486 F.3d 560, 572 (9th Cir. 2007).

[71] *See also* United States Department of Justice. *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories* (February 4, 1994) (finding that a substantial number of minor role drug offenders with minimal criminal histories are much less likely than high-level defendants to re-offend and that a short prison sentence is just as likely to deter them from future offending as a long prison sentence).

D. Sentence Calculation And Concurrent Sentences Under 18 U.S.C. §§ 3584(a) and 3585

Credit for time served is one of the prime areas where an ounce of prevention is worth a pound of cure. The BOP's own website describes state and federal concurrent and consecutive sentences as "probably the single most confusing and least understood sentencing issue in the Federal system."[72] For a generation, judges have been complaining regarding the unfairness and illogic of the present system.[73]

1. De Facto Consecutive Sentences

The BOP creates *de facto* consecutive sentences, which neither state nor federal judges have ordered, in a frequently occurring scenario: 1) a person is arrested by state authorities and is, therefore, in primary state custody; 2) through a writ of habeas corpus ad prosequendum or otherwise, the person is placed in temporary federal custody, is convicted, and receives a federal sentence; and 3) the person is returned to state custody, is convicted, and receives a sentence that is ordered to run concurrently with the federal sentence. Due to failure to construe federal sentencing statutes to avoid serious constitutional problems, the Ninth and other Circuits have approved federal administrative action that forces the federal prisoner to serve the federal sentence consecutively to the state sentence, contrary to the state court's judgment.

Judicial resolution of this problem involves two steps. First, the Supreme Court must resolve the split in the circuits on whether the statute authorizing imposition of concurrent and consecutive sentences – 18 U.S.C. 3584(a) – allows the sentencing judge to impose a sentence consecutive to a yet to be imposed sentence. The Supreme Court has granted certiorari and will decide the question in *Setser v. United States*.[74] Given that the Solicitor General has conceded the point of statutory construction, we can hope that the Court will eventually reach the second question – whether the BOP's rules for making a post-judgment determination whether the sentence should run concurrently with or consecutively to a subsequently imposed state sentence violate sentencing statutes and the Constitution. That

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[72] Henry J. Sadowski, *Interaction of Federal and State Sentences When the Federal Defendant is Under State Primary Jurisdiction*, at 1 (July 7, 2011).

[73] *See Reynolds v. Thomas*, 603 F.3d 1144, 1161 (9th Cir. 2010) (Fletcher, J. concurring) (expressing concern about separation of powers and federalism); *Fegans v. United States*, 506 F.3d 1101, 1104 (8th Cir. 2007) ("Congress should examine the issue because it implicates important federalism and separation of powers concerns."); *Abdul-Malik v. Hawk-Sawyer*, 403 F.3d 72, 76 (2d Cir. 2005) (same).

[74] 607 F.3d 128 (5th Cir. 2010), *cert. granted*, 2011 WL 2348463 (U.S. June 15, 2011).

issue was briefed on a petition for a writ of certiorari to the Supreme Court in *Reynolds*, and, after nine conferences, is apparently being held pending the outcome of *Setser*.[75] The *Reynolds* petition sets out the statutory and constitutional arguments against BOP determination of whether a sentence should run concurrently or consecutively.[76]

While these questions are pending, the most important service we can perform for our clients is to avoid any potential litigation by attempting to account for all pending charges in any criminal proceedings – whether state or federal. We need to work with our state colleagues to assure that, if we are entering a guilty plea, the parties are to the extent possible in agreement on how the sentences should be served. Or, if the better strategy is to leave the later state sentencing to the discretion of the state judge, to make as clear as possible the federal judge's deference to the state court determination regarding how the state case should be served. The basic principles to remember in structuring a global resolution for state and federal charges:

- You have to first determine which jurisdiction has primary jurisdiction over your client's body;

- Appearance in federal court on a writ of habeas corpus ad prosequendum does not transfer primary jurisdiction, only a "release" by the state court will transfer jurisdiction;

- Presentence time spent in state custody, even while in federal custody on a writ of habeas corpus ad prosequendum, will not be credited toward the federal sentence if it has been or will be credited toward a state sentence, regardless of whether the federal sentence is to run concurrently or consecutively to the state sentence.[77]

- To achieve a completely concurrent sentence, you may need to adjust the sentence down or to obtain a departure under U.S.S.G. §§ 5G1.3 and 5K2.23 in order to credit the client with time that the BOP will not credit under § 3585(b).

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[75] *Reynolds v. Thomas*, 603 F.3d 1144 (9th Cir. 2010), *cert. filed* (Nov. 12, 2010) (No. 10-7502).

[76] Available at http://or.fd.org/Case%20Documents/Reynolds%20v%20Thomas%20cert%20petition.pdf

[77] 18 U.S.C. § 3585(b) ("A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences . . . that has not been credited against another sentence.").

In a case involving the still-famous Charles Ponzi, the Supreme Court provided the approach to dealing with dual sovereign cases by analogizing to commercial liens: "The chief rule which preserves our two systems of courts from actual conflict of jurisdiction is that the court which first takes the subject-matter of the litigation into its control, whether this be person or property, must be permitted to exhaust its remedy, to attain which it assumed control, before the other court shall attempt to take it for its purposes."[78] Based on *Ponzi*'s reasoning, some prisoners have prevailed, arguing that the intent of the parties renders the BOP's creation of consecutive sentences unlawful.[79]

2. Good Time Credits On Adjusted Sentences To Achieve A Fully Concurrent Sentence

Once you have decided to seek an adjusted sentence because, under 18 U.S.C. § 3585(b), the BOP cannot credit time that has been credited against a different sentence, what do you do about good time credits? The guidelines device for achieving a fully concurrent sentence, for time in state custody, is to adjust the sentence under U.S.S.G. § 5G1.3. Under conventional interpretations of the concurrency statute along with the mandatory minimum statutes, the courts generally held that the full sentence for the purposes of the mandatory minimum included the adjustment to achieve the fully concurrent sentence.[80]

Despite this well-established interpretation of § 5G1.3, the BOP will only award good time credit on the post-adjustment sentence, not the full sentence. Thus, if a 10 year mandatory minimum sentence is adjusted by three years to account for three years spent in state custody serving a concurrent state sentence, BOP will award good time credit only on seven years of the sentence. The purported reason – good time credit can only be awarded for time served in BOP custody – is undercut by the BOP's policy of routinely awarding good time for presentence time spent in non-BOP custody, and for the time spent serving the concurrent portion of the federal sentence in the state institution. To date the courts have denied relief.[81]

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[78] *Ponzi v. Fessenden*, 258 U.S. 254, 260 (1922).

[79] *See*, *e.g.*, *Buggs v. Crabtree*, 32 F.Supp.2d 1215, 1220 (D. Or. 1998); *Cozine v. Crabtree*, 15 F.Supp.2d 997, 1006 (D. Or. 1998).

[80] *E.g.*, *United States v. Drake*, 49 F.3d 1438, 1441(9th Cir. 1995).

[81] *Lopez v. Terrell*, 679 F.Supp.2d 549, *rev'd*, 2011 WL 2708924 (2d Cir. Jul. 13, 2011); *Schleining v. Thomas*, 642 F.3d 1242 (9th Cir. 2011) (petition for rehearing filed Aug. 10, 2011).

The silver lining from the so far unsuccessful BOP litigation is a useful government concession: The government in both *Lopez* and *Schleining* asserted that the sentencing court has the discretion to grant a variance based on the good time credit not awarded.[82] And it makes powerful sense to grant this variance because, without the credit, the court creates unwarranted sentencing disparity based on the irrational factor of the order of custody.[83] Without the variance for good time credits, identically situated defendants will serve different time in custody for the same federal punishment.

3. Immigration Custody And Dead Time

The statute regarding credit for time served provides broad authority for counting time in official detention in connection with an offense or in relation to any other offense as long as the time has not been credited toward any other sentence.[84] However, in immigration cases, with no statutory authorization, the BOP implements the jail credit statute to treat as dead time the time in the administrative custody of the Immigration and Customs Enforcement.[85] The theory is apparently that time in immigration custody is in relation to deportation, not in connection with the offense, even though the same illegal presence results in a conviction for the immigration offense.

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[82] Brief of Respondent, *Lopez v. Terrell*, 2011 WL 2708924 (2d Cir. Jul. 13, 2011) (No.10-2079), 2011 WL 680803, *8 ("A defendant may request a variance based on good behavior while serving a state sentence for related criminal conduct, a mechanism consistent with the statutory goal of making good conduct time retrospective rather than prospective."); Brief of Respondent, *Schleining v. Thomas*, 642 F.3d 1242 (9th Cir. 2011) (No. 10-35792), 2011 WL 991513, *30 ("A defendant whose federal sentencing has been long delayed may seek a variance based on the lost opportunity for good conduct time credit, which the sentencing court has the discretion to grant.").

[83] *See United States v. Wilson*, 503 U.S. 329, 334 (1992) ("We can imagine no reason why Congress would desire the presentence detention credit which determines how much time an offender spends in prison to depend on the timing of his sentencing.").

[84] 18 U.S.C. § 3585(b) ("A defendant shall be given credit toward the service of a term of imprisonment for any time spent in official detention prior to the date the sentence commences . . .").

[85] Bureau of Prisons Program Statement 5880.28 at 1-15A (Feb. 14, 1997) ("Official detention does not include time spent in the custody of the Immigration and Naturalization Service").

Since 1997, the number of immigration offenses prosecuted in federal court has increased by over ten times.[86] In some of these cases, prisoners are held in immigration custody for weeks while the federal criminal prosecution is arranged. Under civil immigration law, the decision whether to proceed against the alien should be made within 48 hours.[87] Federal prisoners are frequently held longer than two days in immigration custody before their first appearance on an illegal reentry charge. Since the time in administrative custody follows the immigration service's knowledge of their presence, and occurs during the time the federal prosecution is being arranged, the time easily falls within the scope of time in "official detention" in relation to the offense under the statute.

Nonetheless, with no articulable reason in the administrative record, the BOP has adopted the rule categorically denying credit for time spent in administrative custody of the immigration service. There is no conceivable justification for not counting all the time in administrative custody of the prosecuting agency against the ultimate criminal sentence imposed: the failure to credit the time not only violates the plain meaning of the statute, but undercuts the underlying policy of imposing no more incarceration than is necessary to accomplish the purposes of sentencing. The rule also introduces unwarranted sentencing disparities in the time similarly situated aliens spend in actual custody, depending on the vagaries of custodial decisions that are irrelevant to the purposes of sentencing. In some districts, this harsh result is ameliorated by adjusting the sentence by the number days the defendant spent in pretrial immigration custody under the reasoning provided under U.S.S.G. § 5G1.3 and arguably required under § 3553(a). In other jurisdictions, litigation may be necessary.

E. Second Look Resentencing Under 18 U.S.C. § 3582(c)

One of the most heartbreaking situations confronted by defense attorneys is the discovery that, after sentence is imposed, some terrible circumstance calls for a second look at the sentence imposed. For many years, we have exhausted our creativity – sometimes with success – achieving a reasonable resolution where intervening facts such as a permanent physical or medical condition or death or incapacitation of the prisoner's only family member capable of caring for children or some other extraordinary or compelling

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[86] *Compare* U.S. Sentencing Commission, 1997 Data Profile, Table 1, available at www.ussc.gov/JUDPAK/1997/NIN97.pdf (6,671 immigration sentences *with* U.S. Sentencing Commission, Sourcebook of Federal Sentencing Statistics 2010, Table 46, available at www.ussc.gov/ANNRPT/2010/Table46.pdf (74,907 immigration sentences).

[87] 8 C.F.R. § 287.3(d) (requiring ICE to make the decision regarding deportation or prosecution within 48 hours of arrest).

circumstances occur. Congress provided a device for dealing with these situations that is almost never implemented – second look resentencing under 18 U.S.C. § 3582(c)(1)(A)(i).[88]

Under the pre-Guidelines regimen, judges were able to reevaluate whether a sentence was too harsh within 120 days of the case becoming final.[89] In its place, Congress provided for second look resentencing by giving discretion to the sentencing judge to reduce a sentence if the court finds that "extraordinary and compelling reasons warrant such a reductions."[90] Congress realized that a wide variety of circumstances could fit the broad description of "extraordinary and compelling" circumstances and delegated to the sentencing commission the task of setting the criteria for when such circumstances exist.[91] The delegation to Congress included that the Sentencing Commission should include the criteria to be applied and a list of specific examples, only prohibiting rehabilitation alone as an excluded reason. Unfortunately, the Commission did not get around to promulgating a guideline on this issue until 2006, when it promulgated a rule broadly defining the relevant circumstances as:

- a permanent physical or medical condition that substantially diminishes the ability of the prisoner to provide self care within a prison environment;

- death or incapacitation of the prisoner's only family member capable of caring for the prisoner's minor child or children;

- other factors that alone or in combination constitute extraordinary and compelling circumstances with rehabilitation a factor that can only be considered in combination with others.[92]

However, because the judge does not act until the BOP files a motion, this legal structure has nothing to do with the reality on the ground.

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[88] *See generally*, Stephen R. Sady & Lynn Deffebach, *Second Look Resentencing Under 18* U.S.C. *§ 3582(c) As An Example Of Bureau Of Prisons Policies That Result In Overincarceration*, 21 Fed. Sent. R. 167, 168 (2009).

[89] Fed. R. Crim. P. 35 (repealed 1987).

[90] 18 U.S.C. § 3582(c)(1)(A)(i).

[91] 28 U.S.C. § 994(t).

[92] U.S.S.G. § 1B1.13(2007).

From the outset of the program, the BOP has unlawfully implemented the program in three ways. First, instead of providing a gatekeeper function, the BOP has only filed motions that they believe should be granted based on their "death rattle rule," which will be filed only based on imminent proximity to death. As a consequence, the motions are hardly ever filed and, in a recent review of motions, 24 percent of the motions approved by the BOP became moot when the prisoner died before the motion could be ruled upon. Under the statute, the role of the BOP should be solely to determine if there is a showing of extraordinary and compelling circumstances, leaving the sentencing judge to make the decision whether the motion should be granted or not.

The second area of unlawful implementation of § 3582(c) is the BOP's expressed refusal to apply the Commission's definition of "extraordinary and compelling" circumstances. In discussing the Commission's proposed § 1B1.13, the BOP asserted that nothing would change from the way the BOP acted:

> It is important to note that we do not intend this regulation to change the number of . . . cases recommended by the bureau to sentencing courts. It is merely a clarification that we will consider inmates with extraordinary and compelling medical conditions for [reduction in sentence], and not inmates in other common non-medical situations which may be characterized as "hardships," such as a family member's medical problems, economic difficulty, or the inmate's claim of an unjust sentence.[93]

The BOP has publicly defied the plain language of Congress, which delegated to the Sentencing Commission the task of defining "extraordinary and compelling" circumstances.

The BOP's statement reveals a third illegality in the administration of the second look statute: there is no provision in the statute for a BOP "recommendation" regarding the motion. The only requirement is that, if such circumstances are presented, the sentencing judge make a decision based on the 18 U.S.C. § 3553(a) factors, which encompass the full range of sentencing considerations that include performance in the institution. By placing the agency in a position to recommend an outcome, the BOP abandons the neutral gatekeeper function and usurps the role of the judge, who the statute designates as the decision-maker based on § 3553(a) factors. Resentencing is a judicial, not executive, function.

For any prisoner with a valid claim of "extraordinary and compelling" circumstances under the Commission's standard, the BOP's unlawful administration of the statute creates both statutory and constitutional issues that warrant habeas review. As always, if there are negotiations or other creative administrative and litigation tactics, those should be employed

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[93] 71 Fed. Reg. 76619-01 (Dec. 21, 2006).

to try to obtain relief for our client. But if worse comes to worse, we have what appears to be solid bases for challenging the legality of a refusal to file the requisite motion for second look resentencing.

F. Good Time Credit Under § 3624(b)

For a decade, defenders around the country litigated regarding the BOP's rate of good time credits. By awarding the 54 days against actual time served, rather than on the sentence imposed, the BOP reduced the available good time credits by seven days a year, so prisoners must serve 87.2% of the sentence imposed, not 85%. The BOP prevailed 6 to 3 in *Barber v. Thomas*.[94] Although the judicial fix did not work, there are strong reasons for a legislative fix.[95] If your clients or their families are interested in this issue, they should contact FAMM.

G. Challenging BOP Action Through A Petition For Writ Of Habeas Corpus Under 28 U.S.C. § 2241

Prison litigation usually occurs in the district where the prisoner is being held, with the respondent being the warden.[96] A first critical step is appointment of counsel; *pro se* litigation is only rarely successful. Your client's chances of success increase dramatically if you are able to represent or secure representation for him or her. Depending on your district culture, representation can be considered part of the original representation or result from an order from the court either before or after the § 2241 petition has been submitted. Your jurisdiction may have forms for § 2241 petitions or you can simply follow an easy model from our office. If your district uniformly refuses to appoint in § 2241 cases, despite the Criminal Justice Act's specific authorization for discretionary appointment in § 2241 cases,[97] consider whether, through negotiation or litigation, you can change that practice since "the existence of discretion requires its exercise."[98]

1. Exhaustion of Administrative Remedies

The requirement that administrative remedies must be exhausted raises several tactical and legal issues. First, although many courts think otherwise, exhaustion is not a

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[94] 130 S. Ct. 2499, 2506-07 (2010).

[95] Stephen R. Sady, *Too Much Time in Prison*, NAT. LAW JOURNAL (Aug. 30, 2010).

[96] 28 U.S.C. § 2241.

[97] 18 U.S.C. § 3006A(a)(2)(B).

[98] *See United States v. Miller*, 722 F.2d 562, 565 (9th Cir. 1983).

jurisdictional requirement under § 2241, but a waivable judicial requirement.[99] The Bureau of Prisons often argues, incorrectly, that the Prison Litigation Reform Act's strict and inflexible exhaustion requirement applies to Section 2241 – it does not.[100] Where there is no immediate prejudice to the prisoner, we generally recommend that prisoners exhaust their administrative remedies up to the national office before filing a Section 2241 petition for two reasons: 1) by some chance, the client might prevail; and 2) the BOP will be deprived of a procedural argument to obfuscate your issue, particularly in those districts where the courts are quick to dismiss for failure to exhaust. In the situation where your client is facing irreparable harm and futility, courts have waived exhaustion of administrative remedies.[101]

2. 18 U.S.C. § 3625

The BOP sometimes will move for dismissal based on 18 U.S.C. § 3625, which bars consideration of individualized determinations or decisions under the APA. Although the BOP would have § 3625 bar any judicial review, the courts retain jurisdiction to consider the

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[99] *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992); *Woodall v. Fed. Bureau of Prisons*, 452 F.3d 235, 239 n.2 (3d Cir. 2005); *Brown v. Rison* 895 F.2d 533, 535 (9th Cir. 1990); *United States v. Woods*, 888 F.2d 653, 654 (9th Cir. 1989).

[100] *Jones v. Bock,* 549 U.S. 199, 202 (2007); *Casanova v. Dubois*, 304 F.3d 75, 78 n.3 (1st Cir. 2002) (citing cases); *Skinner v. Wiley,* 355 F.3d 1293 (11th Cir. 2004); *Grier v. Hood,* 46 Fed.Appx. 433, 440 (9th Cir. 2002), *on remand*, *Bohner v. Daniels,* 243 F.Supp.2d 1171 (D. Or. 2003), *aff'd*, *Paulsen*, 413 F.3d at 1008.

[101] *Garza v. Davis*, 596 F.3d 1198, 1203 -1204 (10th Cir. 2010) (recognizing futility exception in context of § 2241 petition); *Woodall v. Federal Bureau of Prisons*, 432 F.3d 235, 239 n.2 (3d Cir. 2005) ("[E]xhaustion would be futile, given that *Woodall* is not challenging the application of the BOP regulations, but their validity."); *Elwood v. Jeter*, 386 F.3d 842, 844, n.1 (8th Cir. 2004); *Fournier v. Zickefoose*, 620 F.Supp.2d 313, 317 (D. Conn. 2009); *Boucher v. Lamanna*, 90 F.Supp.2d 883, 887 (N.D. Ohio 2000) (concluding that exhaustion of administrative remedies would be futile where the BOP's policy on categorizing the prisoner's offense as a violent crime was mandatory, the issue was a legal one that the BOP had consistently defended, and the potential for immediate release counseled timely consideration of the petitioner's case); *see also Chevrier v. Marberry*, 2006 WL 3759909, *2-3 (E.D. Mich. Dec. 20, 2006); *Cushenberry v. Federal Medical Center*, 530 F.Supp.2d 908, 912 (E.D.Ky., 2008); *Zucker v. Menifee*, 2004 WL 102779, *4 (S.D.N.Y. Jan. 21, 2004); *Snyder v. Angelini*, 2008 WL 4773142, *2 (E.D.N.Y. Oct. 27, 2008); *Ross v. Fondren*, No. 08-1325, 2008 WL 4745671 (D. Minn. Oct. 29, 2008); *Kelly v. Daniels*, 469 F.Supp.2d 903, 904 (D. Or. 2007); *Scott v. Lindsay*, No. 07 CV 2622(JG), 2007 WL 2585072, at *2 (E.D.N.Y. Sept. 10, 2007).

validity of the rules used to make the individualized decisions.[102] For example, § 3625 expressly exempts challenges to the rulemaking process, or whether the BOP acted outside its statutory authority or unconstitutionally.[103] The latter considerations have provided bases for relief based on arbitrary and capricious actions, upon which some prisoners have prevailed.[104]

3. Remedies

Under the habeas statute, the court should resolve the petition "as law and justice require."[105] In addition to the remedy of release, courts are also empowered to grant injunctive and declaratory relief under the APA, the Mandamus Act, and the Declaratory Judgment Act. Under the APA, the court may enter a judgment or device against the United States provided that "any mandatory or injunctive decree shall specify the Federal officer . . . personally responsible for compliance."[106] Under Section 706, the court may order the BOP to fulfill its statutory duty to administer a program, or to enjoin it from acting beyond its statutory authority or in an arbitrary and capricious manner. Similarly, the Declaratory Judgment Act provides broad authority to fashion an appropriate remedy: "Further necessary or proper relief based on a declaratory judgment or decree may be granted."[107] Neither the APA nor the Declaratory Judgment Act confers jurisdiction; both

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[102] *See Reeb v. Thomas*, 636 F.3d 1224 (9th Cir. 2010) (distinguishing between challenges that are unreviewable under § 3625 and those that are reviewable).

[103] *See* S. Rep. 98-225 at 149 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3332 ("The APA continues to apply to regulation-making authority of the Bureau of Prisons.").

[104] *See*, *e.g.*, *Sacora v. Thomas*, 648 F.Supp.2d 1218, 1222 (D. Or. 2009) ("The BOP's decision to expel petitioner from RDAP without warning, under these circumstances, is an abuse of discretion."); *Salvador-Orta v. Daniels*, 531 F.Supp.2d 1249, 1253 (D. Or. 2008) ("The BOP's decision to deny petitioner eligibility for RDAP [because he complied with court ordered conditions of release] is an abuse of the discretion."); *Barq v. Daniels*, 428 F.Supp2d. 1147, 1151 (D. Or. 2006) (prisoner's expulsion from RDAP arbitrary where grounds not found in rules); *Kuna v. Daniels*, 234 F.Supp.2d 1168, 1169 (D. Or. 2002) (The BOP has acted arbitrarily in denying petitioner RDAP eligibility and imposing additional eligibility requirements not contained in its program statements.); *Seehausen v. Van Buren*, 243 F.Supp.2d 1165, 1170 (D. Or. 2002) (prisoner's due process right to notice violated when he was sanctioned for conduct that was not expressly prohibited).

[105] 28 U.S.C. § 2243.

[106] 5 U.S.C. § 702.

[107] 28 U.S.C. § 2202; *see also Colton v. Ashcroft*, 299 F.Supp.2d 681 (E.D. Ky. 2004) (granting declaratory and injunctive relief against the BOP's cancellation of halfway house

are remedial. In such cases, jurisdiction lies under 28 U.S.C. § 1331 (federal question). Additionally, under 28 U.S.C. § 1361, the court may compel the BOP to perform its duty to administer a program or to exercise discretion where required by law (but not *how* to exercise that discretion).

4. Mootness

One of the impediments to litigating against the BOP is timing. The BOP often delays making decisions regarding RDAP early release eligibility or halfway house transfers until very late in the term of imprisonment. Until the BOP makes a decision, the case is not ripe, and by the time a decision is reached and the exhaustion of administrative remedies has begun, the original remedy sought is no longer possible. In *Reynolds v. Thomas,* the Ninth Circuit reaffirmed a long line of cases holding that an allegation of "over-incarceration" presented in a § 2241 petition was not moot because a district court could consider the excess prison time under § 3583(e)(1) "as a factor weighing in favor of reducing the term of supervised release."[108]

The Third Circuit in *Burkey v. Marberry* found that relief under § 3583(e) was too speculative to defeat mootness.[109] *Burkey* held that prisoners must make a showing of collateral consequences, superimposed with a likelihood of success element, to avoid mootness, even though the Supreme Court held that such requirements did not apply to prisoners still on parole or supervised release.[110]

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program).

[108] 603 F.3d 1144, 1148 (9th Cir. 2010) (citing *United States v. Johnson,* 529 U.S. 53, 59 (2000)); *Arrington v. Daniels*, 516 F.3d 1106, 1112, n.4 (9th Cir. 2008); *Serrato v. Clark*, 486 F.3d 560, 565 (9th Cir. 2007); *Mujahid v. Daniels*, 413 F.3d 991, 994-95 (9th Cir. 2005); *Paulsen v. Daniels*, 413 F.3d 999, 1005 n.3 (9th Cir. 2005); *Gunderson v. Hood*, 268 F.3d 1149, 1153 (9th Cir. 2001). *accord Johnson v. Pettiford*, 442 F.3d 917, 918 (5th Cir. 2006) (per curiam); *Cleckler v. United States,* 410 F. App'x 279, 283 (11th Cir. 2011).

[109] 556 F.3d 142, 144–45 (3d Cir. 2009); *see also Rhodes v. Judiscak*, WL 3134731, *2 -3 (10th Cir. July 23, 2011) (once a prisoner is released, his injury is no longer redressable, and therefore the case is moot).

[110] *See United States v. Johnson*, 529 U.S. 53, 60 (2000); *Gozlon-Peretz v. United States*, 498 U.S. 395, 400-01 (1998)

H. The Power Of The Presentence Report

Your client's presentence report (PSR) is the key document that follows him or her throughout the term of imprisonment and forms the core of the BOP's file on that client. From the very beginning, it is used by the BOP for all sorts of programming and classification decisions, including the client's initial designation. It is important that in reviewing the PSR prior to sentencing, we be alert not only to issues that may affect sentencing (particularly guideline issues) but also to facts that may affect the client after sentencing.

In mid-September 2006, the BOP overhauled its designation policies.[111] Regardless of the offense or criminal history, it is likely that a young client who dropped out of high school and is drug-addicted – even if a first-time, non-violent offender – will serve harder time under these rules.

A client's initial designation is determined by his or her score on Form BP-337, with potential overrides due to "Public Safety Factors" (PSF) or "Management Variables." The scoring is described in detail in Chapter 4 of BOP Program Statement 5100.08, the Security Designation and Custody Classification Manual. The higher the point score, the more restrictive the institution (for males, ordinarily 0 to 11 = minimum, 12 to 15 = low, 16 to 23 = medium, 24+ = high; for females, 0 to 15 = minimum, 16 to 30 = low, and 31+ = high). Public safety factors will override the point score.

The following are a few key designation factors:

- **Age**: A person who is 24 or younger automatically gets 8 points added to his or her score. 25-35 year-olds get 4 points, 36-54 receive 2 points, and those 55 or older don't get any points. The rules are not clear about whether age is determined at sentencing or when the BOP calculates the designation score, where a birthday has intervened. To be safe, if your client is about to turn 25 (or 36 or 55), sentencing after the birthday may be preferable.

- **Education**: The new rules also assign 2 points for those who do not have a verified high school diploma or are not participating in a GED program. One point is assigned if the client is enrolled in a GED program at sentencing. It is imperative that the PSR reflect your client's educational level, or that he is participating in a GED program. Be prepared to provide a high school

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[111] Program Statement 5100.08 (Sep. 12, 2006), *available at* http://www.bop.gov/policy/progstat/5100_008.pdf.

diploma or GED certificate so the court can make a verified finding that the person has the educational level to avoid those points.

- **Drug Use**: Although the new rules assign one point if the client has abused drugs or alcohol in the last five years, if your client is interested in the RDAP program, the PSR needs to reflect a substance abuse history. Do not make the mistake of allowing the client to minimize recent substance abuse in hopes of avoiding this single point if the result may be disqualification for a sentence reduction later. If your client has medical issues, it is important that the PSR adequately describe medical conditions and treatment needs.

- **Detainers**: Mention of detainers, pending charges, or outstanding warrants in the PSR will result in designation points based on the severity of the pending charge and may disqualify clients, regardless of the severity of the outstanding charge, from many programs involving community corrections (halfway house placement and home detention), including RDAP. Resolve anything outstanding before sentencing, but be aware of the impact that new convictions may have on the criminal history score. The PSR should reflect that they have been resolved. Scoring points are not ordinarily applied for immigration detainers, but a deportable alien public safety factor will apply, resulting in at least a low institution (or not minimum custody).

- **Criminal History**: Criminal history is scored according to the Sentencing Guidelines criminal history score, as determined by the judge at sentencing based on the PSR, for security designation purposes. Accordingly, the criminal history section needs special scrutiny and any errors need to be corrected in the PSR, or at a minimum, reflected in the J&C (Judgment and Commitment Order) and the Statement of Reasons, even if the criminal history is not material to the particular defendant's sentence (as in some mandatory minimum or career offender cases). Remember that convictions that score zero criminal history points can disqualify your client from the § 3621(e) sentence reduction for successful completion of RDAP. If the court makes a favorable finding or finds that the criminal history is overrepresentative, try to get the finding reflected in the PSR, J&C, and Statement of Reasons, including the appropriate criminal history category or score.

- **Current Offense**: The current offense point score is not based on the offense of conviction, but on the "most severe documented instant offense behavior." For example, if the offense conduct section of the PSR reflects an aggravated assault, but the conviction is only for simple assault, the score will be 7 points as a greatest severity offense instead of 3 as "moderate." The Offense Severity

Scale is Appendix A to the Designation Program Statement. In drug cases, the severity of the offense is based on drug amounts. The J&C and Statement of Reasons should reflect all favorable rulings such as that a two-point gun bump was not applied, or that the client was not responsible for all the drugs in the PSR. If necessary, ask that portions of the sentencing transcript be attached to the PSR that is forwarded to the BOP. A particular danger in this area will be the failure of the PSR to distinguish clearly between "instant offense behavior" and mere "relevant conduct" or even non-"relevant" (whether or not "related") conduct, and in particular conduct of co-conspirators in which the particular defendant was not implicated. Whenever possible, seek to have the court clean up or at least clarify the PSR in these or similar regards and ensure that Probation includes such corrections with the PSR when it is transmitted to BOP for use in the designation process.

- **Pre-Commitment Status**: Three points are deducted for voluntary surrender, either to the institution or to the Marshals (other than on the day of sentencing).

- **Escapes**: 0-3 points are applied for escapes, including walkaways from a half-way house, based on seriousness and recency. Although absconding, eluding arrest, and failures to appear are not given points, they may result in application of a "greater security" management variable.

Remember that one of the statutory factors for designations is the judge's recommendation.[112] Some judges have become so frustrated with BOP rejection that they resist making requested recommendations. We should argue that their judicial function cannot be categorically refused but requires individualized consideration and a decision on the merits regarding sentence recommendations.

Public safety factors (PSF) are assigned when the BOP believes that extra security measures are required. The BOP does not confine itself to evidence of convictions, but often relies on the description of the behavior either for the current or prior offenses in assigning a PSF. Thus, it is important to request that offending or incorrect material is stricken from the PSF even though it does not affect sentencing scoring. The PSRs are discussed in Chapter 5, as are "management variables" that can justify an override of the scoring in a particular case.

- **Disruptive Group**: This means gang affiliation and applies to males only. Counsel should check that any gang or organized crime affiliation given in the

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[112] 18 U.S.C. § 3621(b)(4).

PSR is substantiated, especially if group is listed in Central Inmate Monitoring System. A disruptive group PSF requires high security, unless waived. As a precaution, you can ask that references to prior gang affiliations be redacted from the PSR.

- **Greatest severity offense (also males only)**: If the offense of conviction is not listed in Appendix A of the program statement, but might be analogized to a listed offense, you can ask the sentencing court for a finding that the offense is not analogous.

- **Sex offender**: Where the PSR reflects any current or past history (convictions not necessary) of "aggressive or abusive" sexual conduct (male or female), possession of child pornography, or questionable or borderline sexual behavior, you may want to seek a finding that the incident did not involve "aggressive or abusive" conduct. A sex offender PSF will trigger the sex offender notification requirement.[113]

- **Threat to government official**: This will result in at least a low security level.

- **Deportable alien**: Applies to all non-citizens, and ensures that they will be housed in at least a low security institution. The only exception is for those who the immigration service has determined will not be deported. If you know that is the case before sentencing, be sure that determination is reflected in the PSR. Reflecting the ever-expanding list of offenses requiring removal for criminal aliens, exceptions to this PSF that existed in prior versions no longer appear;

- **Sentence length**: Only applies to males. More than 10 years remaining to serve (deduct good time credit first) requires Low, more than 20 requires at least Medium, more than 30 (or life) requires High, all unless waived.

- **Violent behavior**: Only applies to females. Two convictions or findings for serious violence within last five years, requires assignment to Carswell Admin Unit, unless waived.

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[113] The many issues related to the sentencing of sex offenders are beyond the scope of this Guide. The Sentencing Resource Counsel has many helpful ideas available at http://www.fd.org/odstb_constructchild.htm.

- **Serious escape**: Applies if within last ten years. Females are required to go to Carswell Admin Unit, unless waived; males must to go to at least Medium, unless waived.

- **Prison disturbance**: Requires High for males, Carswell Admin Unit for females.

- **Juvenile violence**: Applies only to juvenile inmates, if there is history of even one serious violent conviction.

- **Serious telephone abuse**: This factor applies where, according to the PSR, the inmate used or attempted to use a telephone to "further criminal activities or promote illicit organizations," but only if: (I) "leader/organizer" (defined in Appx. A) or "primary motivator"(formerly defined, but no longer, probably inadvertently); or (ii) used phone to communicate threats of death or bodily injury; or (iii) used phone to conduct or attempt significant fraudulent activity while incarcerated; or (iv) leader/organizer of significant fraudulent activity in the community; or (v) used phone to arrange introduction of drugs while incarcerated. Also applies if monitoring of inmate calls is "need[ed]" in response to "significant concern" communicated by federal law enforcement or U.S. Attorney's Office, if inmate has telephone disciplinary violation, or BOP "has reasonable suspicion and/or documented intelligence supporting telephone abuse." In addition to affecting custody, this PSF may cause reduction in standard 300 minute telephone allowance.

When reviewing a PSR, try to be alert to these potential red flags that may not affect the Guidelines' axes or otherwise influence the sentence, but can have a beneficial or adverse effect while your client is incarcerated, especially RDAP eligibility. This admonition applies to all facts that may give rise to a PSF, as well as the facts that will give rise to the security designation score. Seek corrections or clarifications whenever possible, particularly if the PSR mentions co-defendant behavior not involving your client. These include suggestions of past sexual misconduct, gang affiliation, violence, use of a telephone for criminal purposes, threats or retaliation against witnesses, gun possession, and drug or alcohol abuse.[114] Relationships to persons who may want to visit should be clear. Address of residence should reflect, if at all possible, the place to which the client will want to return for supervision after imprisonment.

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[114] Attached is cheat sheet and designation form for your reference as Appendix A.

I. Nuts and Bolts

Most of the information about the BOP is available on their website at bop.gov. The following are links to the most helpful places on the website:

Inmate Locator – http://www.bop.gov/iloc2/LocateInmate.jsp – gives you information on designation, contact information, and the projected release date from which you can check if your client's sentence has been properly calculated.

Facility Directory – http://www.bop.gov/locations/cc/index.jsp – links you to all of the various institutions and has an attached document listing all of the halfway houses.

Inmate Programs – http://www.bop.gov/inmate_programs/index.jsp – links you to more specific information regarding prison programs such as inmate property and how to send money to a prisoner.

Legal Resource Guide – http://www.bop.gov/inmate_programs/index.jsp – this is a guide for attorneys from the BOP's perspective that covers many issues including presentence issues like competency through release preparation issues.

Program Statements – http://www.bop.gov/DataSource/execute/dsPolicyLoc – here is where the BOP posts its program statements on issues such as the RDAP program, categorization of offenses, sentence calculation, and security classifications.

Conclusion

In federal criminal defense, we serve our clients best by seeking the most mitigated outcome in a system stacked toward unreasonable outcomes by mandatory minimum sentences, unreasonably harsh guidelines, and unchecked prosecutorial powers. The BOP's failure to implement ameliorative statutes is an important part of the apparatus that has made the United States the world's leader in imprisoning its people. At sentencing, we need to anticipate BOP practices and policies in reviewing PSRs and advocating for reasonable sentences. After sentencing, we should continue to advocate against BOP positions that result in unnecessarily harsh punishment for our clients.*

*Thanks to Federal Public Defender Law Clerk Kristen Chambers for her assistance in preparing this article.

BP-A0337 **INMATE LOAD AND SECURITY DESIGNATION** CDFRM
JUNE 10
U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

INMATE LOAD DATA			
1. REGISTER NUMBER:			
2. LAST NAME	3. FIRST NAME	4. MIDDLE	5. SUFFIX
6. RACE / 7. SEX	8.ETHNIC ORIGIN	9. DATE OF BIRTH	
10. OFFENSE/SENTENCE			
11. FBI NUMBER		12. SSN NUMBER	
13. STATE OF BIRTH	14. OR COUNTRY OF BIRTH	15. CITIZENSHIP	
16. ADDRESS-STREET			
17. CITY	18. STATE	19. ZIP	20. OR FOREIGN COUNTRY
21. HEIGHT FT IN	22. WEIGHT LBS	23. HAIR COLOR	24. EYE COLOR
25. ARS ASSIGNMENT:			

SECURITY DESIGNATION DATA			
1. JUDGE	2. REC FACILITY	3. REC PROGRAM	4. USM OFFICE

Item	Scoring	
5. VOLUNTARY SURRENDER STATUS IF YES, MUST INDICATE:	**0** = NO **(-3)** = YES 5a. VOLUNTARY SURRENDER DATE: 5b. VOLUNTARY SURRENDER LOCATION:	
6. MONTHS TO RELEASE :		
7. SEVERITY OF CURRENT OFFENSE	**0** = LOWEST, **1** = LOW MODERATE, **3** = MODERATE, **5** = HIGH, **7** = GREATEST	
8. CRIMINAL HISTORY SCORE	**0** = 0-1, **2** = 2-3, **4** = 4-6, **6** = 7-9, **8** = 10-12, **10**= 13 +	
8a. SOURCE OF DOCUMENTED	**-** PRESENTENCE INVESTIGATION REPORT or - NCIC III	

9. HISTORY OF VIOLENCE		NONE	>15 YEARS	10-15 YEARS	5-10 YEARS	<5 YEARS	
	MINOR	**0**	**1**	**1**	**3**	**5**	
	SERIOUS	**0**	**2**	**4**	**6**	**7**	

10. HISTORY OF ESCAPE OR ATTEMPTS		NONE	>15 YEARS	>10 YEARS	5-10 YEARS	<5 YEARS	
	MINOR	**0**	**1**	**1**	**2**	**3**	
	SERIOUS	**0**	**3(S)**	**3(S)**	**3(S)**	**3(S)**	

Item	Scoring	
11. TYPE OF DETAINER	**0** = NONE, **1** = LOWEST/LOW MODERATE, **3** = MODERATE, **5** = HIGH, **7** = GREATEST	
12. AGE	**0** = 55 and over, **2** = 36 through 54, **4** = 25 through 35, **8** = 24 or less	
13. EDUCATION LEVEL	**0** = Verified High School Degree or GED **1** = Entrolled in and making satisfactory progress in GED Program **2** = No verified High School Degree/GED and not participating in GED Program	
13.a HIGHEST GRADE COMPLETED		
14. DRUG/ALCOHOL ABUSE	**0** = NEVER/>5 Years **1** = <5 Years	
15. SECURITY POINT TOTAL		
16. PUBLIC SAFETY FACTORS	**A**-NONE **B**-DISRUPTIVE GROUP (males only) **C**-GREATEST SEVERITY OFFENSE (males only) **F**-SEX OFFENDER **G**-THREAT TO GOVERNMENT OFFICIALS **H**-DEPORTABLE ALIEN **I**-SENTENCE LENGTH (males only) **K**-VIOLENT BEHAVIOR (females only) **L**-SERIOUS ESCAPE **M**-PRISON DISTURBANCE **N**-JUVENILE VIOLENCE **O**-SERIOUS TELEPHONE ABUSE	
17. REMARKS		
18. OMDT REFERRAL (YES/NO)		

FILE IN SECTION 2 UNLESS APPROPRIATE FOR PRIVACY FOLDER **SECTION 2**

PDF Prescribed by P5100 Replaces BP-S337 of FEB 02

SECURITY CLASSIFICATION AND DESIGNATION SUMMARY

Security level determined by points and public safety factors.

PUBLIC SAFETY FACTORS

When *anything* in the PSI indicates that client may fit into any one of these categories, the security level will always go up at least one level.

		Security level
Disruptive Group, prison disturbance	person that the BOP has identified as a prison gang member, includes "not-yet-validated members"	always high
Greatest Severity offense		at least low, never a minimum
Sex Offender	-no conviction necessary -based on conduct not charge or conviction -child porn included	-at least low, never minimum -will preclude CCC placement
Threat to gov't official		-at least low
Deportable alien	-any non-citizen -allows for exception in case of very strong US ties	-at least low
Sentence length remaining	-10 plus years -20 plus years -30 plus years	-at least low -medium -high
Serious Telephone Abuse	-uses telephone to further criminal activities -no conviction necessary, can be based on reasonable suspicion -could be real problem for telemarketing/ internet frauds	-at least low

OFFENSE SEVERITY SCALE:

Offense severity is not based on offense of conviction, but on the "**most severe documented instant offense behavior**" in other words, what the PSI gleans from the police reports. Although the rule reminds the BOP to look at findings of fact, don't assume they will. This scale is also used for determining prior and pending offense severity. Remember that it is not the offense of conviction but the behavior described that determines the level.

For SRVs, if the violation is based on new criminal conduct, that conduct determines the severity score; technical violations are scored as low-moderate (1 point).

Greatest	-Any robbery (unarmed too); most serious sex offenses (porn and statutory rape not included); distribution, exporting automatics, and brandishing or threatening use of weapon (924c "use" offenses); high quantity drug offenses; escape with risk of injury, explosives with risk of death or serious injury	7 points
High	Other explosives, involuntary manslaughter, sex offenses, stalking, residential burglary, cruelty to children	5 points
Moderate	Weapons, assaults, auto theft, breaking and entering, burglary, child abandonment, criminal contempt (dead beat dads ??), walkaway escape, immigration smuggling, property offenses over $250,000 (theft, fraud, tax, forgery, currency offenses), other sex offenses, drugs (lesser amounts)	3 points
Low-moderate	immigration offenses, drugs (ie. less than 1 gm crack), indecent exposure, SRV, property offenses	1 point
Lowest	personal use drugs, gambling, traffic, vagrancy, vandalism	0 points

CRIMINAL HISTORY SCORE

PSR criminal history score is now used. Criminal history section of PSR needs special scrutiny and any errors need to be corrected in the PSR, or at a minimum, reflected in the J&C and the Statement of Reasons, even if the criminal history is not material to the particular defendant's sentence (as in some mandatory minimum or career offender cases). If the court makes a favorable finding or finds that the criminal history is overrepresentative, try to get the finding reflected in J&C and Statement of Reasons, including the appropriate criminal history category or score.

O = 0-1 criminal history points	**4** = 4-6 criminal history points	**8** = 10-12 criminal history points
2 = 2-3 criminal history points	**6** = 7-9 criminal history points	**10** = 13+ criminal history points

HISTORY OF ESCAPES

Escapes are defined broadly, including coming in late at CCC, FTA to avoid prosecution, hit and run. Applies only where there is a "finding of guilt" which includes convictions, disciplinary actions, juvenile adjudications, SRV violations. Can get up to three points if escape was within past 5 years, 1 point if escape was over 10 years ago.

HISTORY OF VIOLENCE

Includes entire background, even those that do not receive criminal history points under the Sentencing Guideline (ie, barroom brawl forty years ago) where there is a "finding of guilt." The points assigned combine seriousness of violence and recency. For example, a recent minor assault gets 5 points, while a aggravated assault 15 years ago gets 2 points. If client has both, 7 points are assigned.

PRECOMMITMENT STATUS

Three points are subtracted if released on own recognizance or voluntary surrender. Pre-trial placement in CCC doesn't count, nor if there is "any indication of bail violation, failure to appear."

DETAINERS

Under the old and new rules, mention of detainers, pending charges or outstanding warrants in the PSR will result in designation points based on the severity of the pending charge using the offense severity scale. Scoring points are not ordinarily applied for immigration detainers, but a deportable alien public safety factor will apply resulting in at least a low institution.

AGE

A person who is 24 or younger automatically gets 8 points added to his or her score. 25-35 year-olds get 4 points, 36-54 receive 2 points, and those 55 or older don't get any points. The rules are not clear about whether age is determined at sentencing or when the BOP calculates the designation score, where a birthday has intervened. To be safe, if your client is about to turn 25 (or 36 or 55), you may want to delay sentencing until after his birthday.

EDUCATION

Assign 2 points for those who do not have a verified high school diploma or are not participating in a GED program. One point is assigned if the client is enrolled in a GED program at sentencing. It is imperative that the PSR reflect your client's educational level, or that he is participating in a GED program. Be prepared to provide a verified high school diploma or GED certificate. It may not be enough for the court to make a finding, based on believing the defendant's representation, that the person has a GED certificate.

DRUG USE

Assign one point if the client has abused drugs or alcohol in the last five years. If your client is interested in the DAP program, the PSR needs to reflect a substance abuse history. Don't make the mistake of allowing the client to minimize recent substance abuse in hopes of gaining this single point if the result may be forfeiture of a sentence reduction later.

SCORING TABLE

Points	Public Safety Factors	Security level
0 - 11	-No public safety factors -deportable alien, juvenile violence, greatest severity offense, sex offender, serious telephone abuse, treat to gov't official, more than 10 less than 20 years left -more than 20 less 30 years left, serious escape -more than 30, non-parole life, death penalty, disruptive group and prison disturbance	minimum low medium high
12-15	-no public safety factors -serious escape, 20-30 years left -30+ years left, true life, death, disruptive group, prison disturbance	low medium high
16-23	-no public safety factors -30+ years left, true life, death, disruptive group, prison disturbance	medium high
24+		high