

Advice to New Commissioners: The U.S. Sentencing Commission Should Address the Failure of the Bureau of Prisons to Adequately Implement Statutes That Reduce Prison Time



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I. Introduction

As the U.S. Sentencing Commission revives after years without a quorum, a top priority should be addressing a statutory duty that has been neglected since the Commission's inception: the mandatory obligation, under 28 U.S.C. § 994(g), to "make recommendations concerning any change or expansion in the nature or capacity of [correctional] facilities and services that might become necessary as a result of the guidelines promulgated." In 1987, when the Federal Sentencing Guidelines came into effect, there were fewer than 50,000 prisoners in the federal system; since then, that number has tripled to more than 150,000 federal prisoners. Although Congress has repeatedly provided options and directives that would reduce the time defendants spend in prison, the Federal Bureau of Prisons (BOP) has failed to implement the full scope of the available authority, resulting in expensive and pointless overincarceration.

The newly constituted Commission's role in making recommendations to the BOP is informed by history: the thirty-five years since the effective date of the Sentencing Reform Act. Congress "intended that the Commission make recommendations as to any changes in th[e correctional system's] capacity that it believes to be necessary in light of its sentencing guidelines."¹ Nevertheless, to date, the Commission has done little to exercise its recommendation mandate, despite the need to balance the greater length of guidelines sentences with full availability of ameliorative programming.

With a new BOP Director coming aboard, now is the time to exercise that authority. The Commission should prioritize making recommendations based on the practical realities of how the BOP carries out its responsibilities. A decade ago, the Government Accountability Office and the Federal Public and Community Defenders provided information regarding a wide range of simple and fair reforms that could be implemented without new legislation to close the huge gap between what sentencing statutes allow and how the BOP carries out its authority,² yet little change resulted. Many of those same simple reforms remain

available today, with additional ameliorative statutes now in play.

This Article looks first to the history that demonstrates the urgent need for the Commission to act now to provide specific programmatic advice to the BOP. Setting out the statutory bases and history of implementation under each ameliorative statute, it then offers thirteen specific recommendations that the Commission should make to the BOP, regarding six ameliorative programs: community corrections, the Residential Drug Abuse Program (RDAP), sentence computation rules, consecutive/concurrent sentencing rules, boot camp, and earned time credits. Each of the suggested recommendations calls for simple administrative fixes, without any new legislation, and each recommendation could conserve millions in taxpayer dollars and permit men and women to return to their families days, weeks, and months earlier. The key recommendations can be summarized as follows:

- Increase the availability of community corrections commensurate with repeated statutory directives for greater use of residential reentry centers and home confinement (18 U.S.C. § 3624(c)).
- Expand eligibility and availability of sentence reductions under RDAP by (1) allowing individuals with detainees to both participate in the program and receive sentence reductions, (2) maximizing the length of sentence reductions and community corrections for those who successfully complete the residential program, and (3) eliminating mere firearm possession as a disqualification for sentence reductions (18 U.S.C. § 3621(e)).
- Eliminate three sentence computation rules that create longer sentences: (1) pretrial custody credit should include time in immigration detention (18 U.S.C. § 3585(b)); (2) state concurrent sentences should receive either pretrial custody credit or nunc pro tunc designation to avoid creating de facto consecutive sentences (18 U.S.C. §§ 3584(a) and 3585(b)); and (3) good time credits should be awarded for time in state custody on partially concurrent sentences (18 U.S.C. §§ 3585(b), 3584(a), and 3624(b)).

Federal Sentencing Reporter, Vol. 35, No. 1, pp. 12–23, ISSN 1053-9867, electronic ISSN 1533-8363.

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- Implement broader statutory and guideline standards to file compassionate release motions any time extraordinary and compelling reasons exist, leaving to the sentencing judge the decision whether the sentence reduction should be granted (18 U.S.C. § 3582(c)(1)(A)(i)).
- Revive the boot camp program to provide nonviolent offenders sentence reductions and expanded community corrections (18 U.S.C. § 4046(a) and 28 C.F.R. § 524.31(b)).
- Fully implement the First Step Act's earned time credit program (18 U.S.C. §§ 3632(d) and 3624(g)).

II. The Need for Commission Action and the Existing Statutory Bases for Reform

A. In the Absence of the Sentencing Commission Exercising Its Statutory Obligation to Make Recommendations Regarding Correctional Resources and Programs, Individuals Have Served More Time Than Necessary in Prison

The Commission has defined itself, for the most part, by developing the Sentencing Table's offense levels and criminal history categories, amending the guidelines, and studying the effects of guidelines and sentencing statutes. Although these front-end functions guide the sentences imposed, the execution of sentences—back-end policies and practices—has largely been ignored. But Congress understood connection between the sentences imposed and how those sentences are carried out. It directed that the Commission “shall make recommendations concerning any change or expansion in the nature or capacity of [penal, correctional, and other] facilities and services that might become necessary as a result of the guidelines promulgated pursuant to the provisions of this chapter.”³

The Commission's statutory role in providing recommendations is essential. Prisoners themselves are virtually voiceless regarding their conditions of confinement. Advocacy groups' suggestions can be administratively shrugged off. Litigation carried out by the few attorneys with the expertise to make their way through the procedural quagmire of administrative law face the limitless resources of a multi billion-dollar agency that takes advantage of every procedural obstacle. The Commission has unique power to offer insight and influence, given its institutional expertise and statutorily conferred authority.

As the United States has achieved notoriety for its rates of incarceration,⁴ the Commission has occasionally taken steps to offset overly punitive sentencing, such as its work against the discriminatory and irrational 100:1 crack to powder cocaine ratio and the general reduction of Drug Quantity Table offense levels in Amendment 782. But on back-end resources and programs, the Commission has been mostly silent. Meanwhile, federal prisoners' sentences

are de facto increased by the BOP's weak or nonexistent implementation of ameliorative statutes.

For example, the Commission developed the Sentencing Table's months in prison assuming, based on 18 U.S.C. § 3624(b), that individuals would receive good time credits at the rate of fifty-four days per year, or 15% of the sentence imposed.⁵ In implementing the same statute, however, the BOP provided only forty-seven days for every year of the term of imprisonment, or 12.8% good time credits, by granting credit based on the time actually served rather than the sentence imposed.⁶ Despite years of controversy over good time credits, the Commission did nothing to either adjust its own sentencing tables or recommend that the BOP implement the good time credit statute consistently with the Commission's calibration. Finally, in the First Step Act of 2018, Congress clarified that the Commission's means of calculating good time credit was correct.⁷ But in the meantime, for thirty-one years, well-behaved prisoners have been over-serving time in prison by days, weeks, and months—with millions of taxpayer dollars wasted.⁸

In deciding whether to act on its congressional power to make recommendations to the BOP, the reanimated Commission may ask itself: Why would the BOP be stinting in providing inmates with sentence reductions, community corrections, credit for time served, and good time credit authorized by statute? After years of litigating against the BOP, I cannot provide the “why,” but I can attest to the existence of a deeply entrenched institutional bias that—despite overcrowded prisons and dangerous staff-to-inmate ratios—always bends toward greater prison time. The history of each recommendation demonstrates the BOP's institutional resistance to ameliorative reform and the need for Commission advocacy.

B. Each Recommendation Has the Potential to Reduce Unnecessary Prison Time Through Administrative Action Based on Existing Statutory Language

Since the effective date of the guidelines era, the problem of overincarceration has been well known but ineffectively addressed. Even the Department of Justice, in a 1994 study that led to the RDAP and boot camp programs, recognized that sentences for nonviolent offenders were too long, and even longer for noncitizens.⁹ Yet, while ameliorative statutes exist, the history of each back-end program discussed in this Article—from community corrections, to sentence reductions and sentence calculations, to compassionate release—illustrates the same pattern of unnecessary prison time served due to BOP inaction or stinting implementation. Thus, each of the suggested recommendations the Commission should make to the BOP originates in the statutes enacted as part of the Sentencing Reform Act or by later amendments, and each can be administratively implemented to reduce prison time without the need for any new legislation.

III. Suggested Sentencing Commission Recommendations to the Bureau of Prisons

A. The Sentencing Commission Should Recommend Greater Use of Community Corrections Under 18 U.S.C. § 3624(c)

When Congress abolished parole in the Sentencing Reform Act, the statute left in place a mechanism for “prerelease custody,” also known as “community corrections”—placing federal prisoners in the community for a period of adjustment near the end of their terms of imprisonment and before the commencement of their terms of supervised release. Persons in community corrections—residential reentry centers and home confinement—continue to be in the custody of the BOP serving their terms of imprisonment. The determination of transfer to community corrections is based on the same individualized factors listed in 18 U.S.C. § 3621(b) that guide institutional placement. Congress has consistently placed increasing emphasis on the importance of community corrections to promote rehabilitation, to bring down prison populations, and to save taxpayer money on incarceration (\$120.59 per prisoner per day for federal prison, \$97.44 for residential reentry centers, \$55.00 for home confinement).¹⁰ But the BOP has not followed the congressional lead on greater access to residential reentry centers, even cutting back in recent years on their limited availability. The Commission should recommend expansion of residential reentry centers and home confinement and the adoption of rules maximizing their use.

Recommendation 1. The BOP should expand its capacity for community corrections by providing more funding for existing resources and contracting with more reentry centers to house individuals closer to their permanent residences.

The Sentencing Reform Act originally said very little about what constituted pre-release custody, but it required that the BOP “shall”—to the extent practical—assure that “a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last 10 per centum of the term to be served under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for his re-entry.”¹¹ In 1990, Congress added home confinement as an authorized component of pre-release custody.¹² And for almost twenty years, community corrections received little congressional attention.

Since then, Congress has consistently ramped up the expected use of community corrections. In April 2008, with strong bipartisan support, Congress passed the Second Chance Act, which doubled the permissible time for pre-release custody to community corrections from six months to one year.¹³ The new one-year maximum includes both placement in a residential reentry center and home confinement of up to six months or 10% of the sentence, whichever is less.¹⁴

In a separate section of the Second Chance Act, Congress created a “Federal prisoner reentry initiative,” confirming its goal to expand the use of community

corrections.¹⁵ The initiative directed the Attorney General and the BOP, subject to available appropriations, to use “the maximum allowable period in a community confinement facility” as an incentive for participation in programming.¹⁶ The initiative also directed the Attorney General “to modify the procedures and policies” to improve transition to the community.¹⁷

Following the Second Chance Act, Congress continued to encourage expanded use of community corrections. In the First Step Act, Congress amended § 3621(b) to require that the BOP place defendants in facilities, which include residential reentry centers, “as close as practicable to the prisoner’s primary residence,”¹⁸ and amended § 3624(c)(2) to direct that the BOP “shall, to the extent practicable, place prisoners with lower risk levels and lower needs on home confinement for the maximum amount of time permitted under this paragraph.”¹⁹ Most directly, Congress stated, “The Director of the Bureau of Prisons shall ensure there is sufficient prerelease custody capacity to accommodate all eligible prisoners.”²⁰ Then, in response to the nationwide coronavirus pandemic, Congress passed the CARES Act, which expanded the potential time a prisoner may spend on home confinement during the emergency.²¹

Despite Congress’s authorization of more and longer use of community corrections, the BOP has cut back on contracts and defunded reentry centers. As documented in submissions to the BOP and to Congress, the BOP’s practices have shrunk the ability to provide community corrections by

- failing to renew contracts with reentry centers and doing so without consulting the chief judge of the judicial district affected;
- decreasing the number of reentry beds and significantly reducing the minimum number of beds for which it will guarantee payment; and
- decreasing the amount of pre-release time, with the average length “likely to decline to about 120–125 days.”²²

As a consequence, many people are left without adequate reentry services. In Oregon, after the Lane County Sheriff ended its contract with the BOP to provide reentry services, the BOP withdrew its solicitation for a new reentry center, eliminating beds for men and women coming home to central Oregon. Similarly, the BOP cut the number of beds under contract at Portland’s Northwest Regional Reentry Center in its last contract revision, from 120 beds to 76 beds, reducing services by more than a third. Oregon is just one example of the nationwide failure to provide local resources for the critical task of transitioning citizens from prisons to our communities.²³

The BOP’s reduced support of community corrections runs exactly opposite to congressional policies expanding the availability of rehabilitative resources that return individuals to their families and communities sooner. The Commission should strongly recommend increased use of community corrections as individuals complete their terms of imprisonment.

Recommendation 2. *The BOP should promulgate a regulation guiding community corrections placement pursuant to 18 U.S.C. § 3624(c)(6) that includes: (a) the presumptive maximum use of pre-release community corrections; (b) earlier placement in reentry centers followed by home confinement if, in the absence of the CARES Act emergency, home confinement is limited to six months; and (c) clear directives to eliminate the informal six-month-or-less norm for community corrections.*

In the Second Chance Act, when Congress expanded community corrections authority from six months to one year, it also directed the BOP to promulgate regulations within ninety days regarding the “sufficient duration” of community placements:

The Director of the Bureau of Prisons *shall issue regulations* not later than 90 days after enactment, which shall ensure that placement in a community correctional facility is

- (A) conducted in a manner consistent with § 3621(b) of this title;
- (B) determined on an individual basis; and
- (C) of sufficient duration to provide the greatest likelihood of successful reintegration into the community.²⁴

On October 21, 2008, “well past” the ninety-day deadline, the BOP issued an interim rule that did little more than repeat the statutory language.²⁵ The actual practice on the ground remained unchanged, as informal rules maintained the pre-Second Chance Act six-month limit on community corrections absent exceptional circumstances.²⁶ In any event, the interim rule was deemed invalid because the BOP did not provide notice-and-comment required by the Administrative Procedure Act.²⁷

Over a decade after the mandatory ninety-day deadline, the BOP still has not promulgated a valid final regulation as required by 18 U.S.C. § 3624(c)(6). Although advocacy groups criticized the BOP’s proposed interim rule for its failure to provide greater access to community corrections,²⁸ little has changed.

The Commission should recommend that the BOP adopt the main themes of the 2011 comments on its interim rule. First, the individualized decision regarding transfer to community corrections should begin with a presumption of the maximum available community corrections, with considerations for delay informed by the individual designation considerations in § 3621(b). Second, in the absence of the pandemic emergency, the time in community corrections should contemplate stacking the residential reentry component on available home confinement to reach the maximum available pre-release custody. Third, the rule should explicitly reject the pre-Second Chance Act six-month limit to community corrections.

B. The Sentencing Commission Should Recommend Greater Use of Sentence Reductions and Community Corrections Under the Residential Drug Abuse Program Authorized by 18 U.S.C. § 3621(e)

In 1990, Congress mandated the creation of BOP programs to address prisoners’ needs for substance abuse treatment, which included in-prison residential treatment: RDAP.²⁹ But few prisoners enrolled in the rigorous residential program. In 1994, Congress enacted 18 U.S.C. § 3621(e)(2)(B) to incentivize participation in RDAP by offering a sentence reduction of up to one year for nonviolent offenders.³⁰ Congress explicitly recognized reduction of prison overcrowding as a benefit of the program: “To the greatest extent possible, BOP shall prioritize the participation of nonviolent offenders in [RDAP] in a way that maximizes the benefit of sentence reduction opportunities for reducing the inmate population.”³¹

The Commission has found RDAP effective at reducing recidivism.³² But the BOP has systematically underutilized the statutory authority to reduce sentences in three basic ways: (1) by failing to allow prisoners with detainers to participate; (2) by only allowing participation at the end of the sentence, resulting in shorter sentence reductions; and (3) by disqualifying individuals with mere gun possession from early release.

Recommendation 3. *The BOP should allow all statutorily eligible prisoners, including those with detainers, to participate in RDAP and receive the § 3621(e) sentence reduction.*

Beginning in 1997, Congress required the BOP to provide residential treatment to “all eligible prisoners.”³³ Congress defined the term “eligible prisoner” with only two criteria: a documented substance abuse problem and a willingness to participate in residential treatment.³⁴ The statute also defined “residential substance abuse treatment” as in-prison individual and group treatment, set apart from the general prison population, lasting at least six months.³⁵ The statutory early release incentive is available to a subset of eligible prisoners: those with nonviolent offenses who successfully complete the residential program.³⁶

As first implemented, the BOP permitted all “eligible prisoners” to participate in RDAP and to receive the early release incentive if they met the statutory nonviolent offense criteria, regardless of detainers.³⁷ Since then, however, the BOP has administratively disqualified individuals with detainers—either for an immigration hold or due to a pending state case—from participating in RDAP and receiving the available sentence reduction, despite the mandatory statutory language regarding participation.³⁸

How did this happen? Although the statute clearly defines residential treatment as *in-prison* treatment, the BOP added a new community-based component, to be completed during pre-release custody. This effectively excluded from RDAP participation anyone ineligible for community corrections—those with immigration holds or

state detainees. The BOP based its new requirement on a misconstrued comment from the American Psychiatric Association (APA) that favored more than one monthly session during the *transitional* component of RDAP—the time in BOP custody between residential treatment and release.³⁹ Although the APA corrected the BOP’s erroneous understanding of its comment, explaining that all eligible prisoners should benefit from RDAP, regardless of detainees,⁴⁰ the BOP’s regulation continues to exclude thousands of prisoners with detainees from eligibility for the sentence reduction by adding a third requirement for sentence reduction eligibility found nowhere in the statute: the ability to participate in community corrections.⁴¹ For citizens of other countries, the disqualification not only precludes participation in a beneficial treatment program, but prevents them from receiving sentence reductions available to similarly situated U.S. citizens whose sentences can be reduced by up to a year.

The BOP had an institutional incentive to adopt this narrower and statutorily suspect definition of “all eligible prisoners.” After originally reporting shortfalls in RDAP availability, the BOP simply redefined “eligible prisoners” to exclude those who could not be transferred to community corrections because of detainees.⁴² Thus, the BOP administratively cut, with no statutory basis, the 33.6% of the 56,926 defendants sentenced in 2021 who were not U.S. citizens, plus those with state detainees, from the ability to even participate in RDAP.⁴³

The Commission should strongly recommend that all eligible prisoners be able to participate in RDAP and to receive the sentence reduction incentive for successful completion of the in-prison residential and transitional components, if statutorily eligible, regardless of detainees. The Commission’s recommendation not only would address overincarceration and rehabilitation but would carry out the statutory duty to avoid unwarranted disparities, especially disparities that frequently involve harsher treatment for racial minorities from other countries.

Recommendation 4. The BOP should encourage maximum sentence reductions and community corrections for successful completion of RDAP through earlier entry and greater availability of the program.

The sentence reduction authorized by Congress for successful completion of RDAP is “up to one year.” But the BOP has consistently granted less than one year. The main reason for this insufficient utilization of statutory relief is that prisoners are not placed in RDAP until close to their projected release date. The lack of beds available in the program often results in a glut of need as sentences approach expiration.

Failing to fully implement the § 3621(e) sentence reduction program is inconsistent with Congress’s aim for the program to “maximize[] . . . opportunities for reducing the inmate population.”⁴⁴ In *Close v. Thomas*, the Ninth Circuit commented that the BOP’s stinting administration of RDAP and the program’s “insufficient capacity” had

“created a troubling situation that calls for a legislative or regulatory remedy.”⁴⁵

By delaying entry and having insufficient beds, the BOP not only shortens sentence reductions but also limits time in community corrections. Even before the First Step Act, BOP rules favored maximum community corrections for RDAP participants.⁴⁶ Under the First Step Act’s earned time credit program, RDAP is an evidence-based recidivism reduction program that authorizes even earlier community corrections.⁴⁷ And in-prison transitional programming is available when completion of the residential component results in additional time before community corrections placement or release. By following its own policies on community corrections, the BOP can increase the length of RDAP sentence reductions and decrease time behind prison walls.

The regulatory fix is easy: expand the availability of this excellent program and do not delay entry. The Commission should recommend that the BOP fund sufficient beds for all eligible prisoners, that participants should be able to enter RDAP earlier in their terms of imprisonment, and that the BOP should improve the in-prison transition program after the residential component is completed.

Recommendation 5. The BOP should not categorically disqualify nonviolent offenders from § 3621(e) sentence reductions based on the mere possession of firearms.

The sentence reduction statute broadly authorizes sentence reductions to any “prisoner convicted of a nonviolent offense” who successfully completes RDAP. But the BOP has greatly narrowed eligibility by treating the mere possession of a firearm as a disqualification.⁴⁸ The BOP has had trouble administratively articulating a reason for this disqualification, and there is no empirically based justification for the disqualification.

The initial litigation regarding gun possessors established that they are statutorily eligible nonviolent offenders within the meaning of § 3621(e). In May 1995, the BOP promulgated a regulation that defined the statutory term “nonviolent offense” as the converse of “crime of violence” as defined in 18 U.S.C. § 924(c).⁴⁹ At the same time, through a program statement, the BOP deemed individuals to be statutorily ineligible for a sentence reduction based on convictions involving the mere possession of a firearm, including being a felon in possession of a firearm (18 U.S.C. § 922(g)) or drug trafficking with a two-level specific offense characteristic for possession of a weapon.⁵⁰ The courts generally held that the program statement was inconsistent with the statute because, under the relevant statutes, gun possession and drug trafficking are nonviolent offenses.⁵¹

After the first wave of litigation, the BOP conceded that gun possessors were statutorily eligible for sentence reductions but published an interim rule and accompanying program statement that modified the crime of violence construct by substituting the Director’s discretion to disqualify § 922(g) offenders and drug offenders with

a gun enhancement.⁵² Ultimately, the Supreme Court upheld the BOP's discretionary authority to disqualify additional classes of statutorily eligible prisoners from the sentence reduction incentive.⁵³ But the lower courts, over years of litigation, found the interim rule invalid for violation of notice-and-comment under § 553(b) of the Administrative Procedure Act,⁵⁴ and a later iteration of the same rule was deemed arbitrary and capricious under § 706(2)(A) because the BOP "failed to set forth a rationale for its decision[.]"⁵⁵ This litigation history explains why, from 1995 to 2012,⁵⁶ hundreds of gun-possessing defendants were deemed eligible through court orders and BOP Operations Memorandums that implemented Ninth Circuit decisions.

The BOP has generated empirical evidence that prisoners who successfully complete RDAP have lower rates of recidivism.⁵⁷ The same appears to be true regarding prisoners who were initially disqualified from the § 3621(e) sentence reduction solely on the basis of gun possession and then successfully completed RDAP. The BOP should change its rule to establish that mere gun possessors, who are nonviolent within the meaning of the statute, should be deemed categorically eligible for sentence reductions for successful completion of RDAP.

C. The Sentencing Commission Should Recommend That the BOP Eliminate Sentence Computation Rules That Increase Prison Time

The BOP administers sentences through the Sentence Computation Manual.⁵⁸ For years, the Manual has increased sentences by failing to count time in official detention, by creating *de facto* consecutive sentences, and by failing to provide good time credits for the concurrent portion of federal sentences served in state custody. The BOP's practices, which appear to be inconsistent with the relevant statutes, are amenable to administrative correction to reduce overincarceration and to administer sentences fairly.

Recommendation 6. The BOP should provide pretrial custody credit for post-arrest time in immigration detention because it constitutes official detention under 18 U.S.C. § 3585(b).

Congress specifically instructed that all pretrial time in "official detention" after the offense should be credited against the federal term of imprisonment, as long as the time is not credited against another sentence.⁵⁹ Defendants can spend days, weeks, and sometimes months in immigration custody before their first appearance in federal court. Although immigration detention involves the same lost liberty as other pretrial custody,⁶⁰ the Manual instructs sentence calculators to refuse to count that time as "official detention."⁶¹ The Ninth Circuit explicitly addressed the BOP program statement and found it to be inconsistent with the statute.⁶² Nevertheless, the BOP continues to follow its Manual, creating dead time that prolongs incarceration for citizens of other countries.

Under the plain meaning of "official detention," defendants should receive credit for time served in U.S. Immigration and Customs Enforcement (ICE) custody. Failure to provide credit perpetuates unwarranted disparity of similarly situated defendants. For example, a person who robs a bank, who is first held in state custody for thirty days before being released to federal custody when the state case is dismissed, will receive full credit for the thirty days spent in state custody against the federal bank-robbery sentence. But a citizen of another country who spends thirty days in ICE custody before being charged in federal court will not receive credit against any later federal sentence. The Commission should strongly recommend that the BOP delete Manual language on immigration custody and explicitly identify immigration custody as "official detention" for the purposes of computing pretrial custody credit.

Recommendation 7. The BOP should eliminate de facto consecutive sentences under 18 U.S.C. § 3584(b).

The BOP's regional counsel once called the interaction between state and federal concurrent and consecutive sentences one of the "most confusing and least understood" areas of federal sentencing law.⁶³ The origin of that complexity is the BOP's interpretation of the pretrial custody statute (§ 3585(b)) to treat a state concurrent sentence, even one explicitly imposed to run concurrently with the prior federal sentence, as "another sentence" that forecloses federal credit. The following scenario is not unusual:

- A state arrest places a person in the state's primary jurisdiction.
- The federal prosecutor then files a writ of habeas corpus ad prosequendum to pursue a federal prosecution against the same person.
- The federal judge imposes a sentence that is silent on whether the federal sentence should run concurrently or consecutively with the yet-to-be-imposed state sentence.
- After the federal prosecution is complete, the person returns to state court, where the state judge orders the state sentence to run concurrently with the federal sentence.

In this scenario, under the BOP's existing policies, all of the time in primary state custody is credited only against the state sentence, even while the defendant is physically in federal custody during the execution of the writ of habeas corpus ad prosequendum. And the federal sentence does not commence until the state sentence is fully satisfied. Thus, the BOP executes such sentences as *de facto* consecutive, even though no judge ever ordered the sentence to run consecutively and the state judgment explicitly intends concurrency. This administrative decision increases time in custody by months and years.

There are two simple solutions that would allow the sentences in the above scenario to be executed concurrently, both as to pretrial credit and once the sentences are imposed. First, the BOP should administratively deem an

expressly concurrent sentence as not “another sentence” within the meaning of § 3585(b).⁶⁴ Then, the pretrial custody would be credited as any other sentence. Second, the BOP should not make the quintessential judicial decision of concurrency. Currently, once the federal sentence is imposed, the BOP conducts its own evaluation of whether the federal sentence should be allowed to commence while the individual remains in state custody serving the state sentence, through the discretionary *nunc pro tunc* (retroactive) designation of the state facility for service of the federal sentence. The constitutional problems with an executive-branch agency usurping the judicial role of deciding the concurrency questions are substantial.⁶⁵ And when the federal judgment is silent, respect for the state judge’s concurrency decision avoids defendants serving more time than any judge determined was necessary to accomplish the purposes of sentencing.

The Commission should recommend that the BOP revise its sentence calculation procedures to avoid *de facto* creation of consecutive sentences. Instead, when the federal judgment is silent and the state judgment orders concurrency, the BOP should execute the sentences to run concurrently by not treating the state sentence as “another sentence” for pretrial credit purposes or by requiring *nunc pro tunc* designation to the state facility.

Recommendation 8. The BOP should provide good time credits on time adjusted to achieve concurrency under 18 U.S.C. § 3624(b).

The BOP’s interpretation of § 3584(b) also creates problems when, after a state sentence has been imposed, the federal judge exercises authority under 18 U.S.C. § 3584(a) to run the sentence concurrently. Because the BOP treats the state judgment as “another sentence,” despite the federal judge’s concurrency order, the time in state custody prior to arriving in federal court will not be credited under § 3585(b). From the multiple amendments to U.S.S.G. § 5G1.3, the general work-around, under the guidelines, has been for the federal sentencing judge to adjust the term of imprisonment down by the amount of time in state custody prior to the federal sentencing, with a notation in the judgment that the adjustment is to achieve concurrency due to the manner in which the BOP forecloses prior custody credits under § 3585(b).⁶⁶

This awkward way of achieving full concurrency routinely creates unwarranted disparity because the BOP does not consider the credited time in state custody to be part of the federal sentence and refuses to award good time credits under 18 U.S.C. § 3624(b) to well-behaved prisoners for that time. This is different than how the BOP treats other types of pre-sentence custody credit. For time credited under 18 U.S.C. § 3585(b), the BOP awards good conduct time credit, even when that time is served in state custody. In response to litigation regarding the disparities caused by forcing the concurrent portion of a federal sentence—which can be months or years long—to be served day-for-day, the BOP asserted that sentencing judges may grant a further

variance to provide the good time credits: “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.”⁶⁷

But variances are an inappropriate and inadequate way of achieving full concurrency including good time credits. Defendants would first need to be aware that they were not going to receive good time credits, then realize, despite no mention in the Guidelines Manual, that a variance should be requested, then depend on discretion rather than the BOP’s normal awarding of earned good time credits. And the wholesale loss of good time credits can create large unwarranted disparities by treating similarly situated defendants differently in terms of actual custody, particularly because the amount of time in state custody often depends on whether the individual exercised various pre-trial and trial rights. Thus, similarly situated defendants end up serving varying times of actual custody based on the failure to grant good time credits, even when the total sentence intended by the judge is identical, based on the arbitrary timing of sentencing.⁶⁸

The Commission should recommend that the BOP revise its sentence calculation rules to award good time credits earned during the concurrent part of an adjusted sentence.

D. The Sentencing Commission Should Recommend That the BOP Revise Its Rule on Compassionate Release Under 18 U.S.C. § 3582(c)(1)(A)(i) and Submit Motions on Behalf of Eligible Prisoners, Leaving Solely to the Judge the Decision Whether the Motion Should Be Granted

The Sentencing Reform Act included the compassionate release statute that, as originally written, authorized the sentencing judge, only upon motion of the BOP, to reduce the term of imprisonment after considering the factors set forth in 18 U.S.C. § 3553(a), if “extraordinary and compelling reasons” warrant such a reduction.⁶⁹ Congress viewed § 3582(c) as a mechanism to fill the “substantial void in the sentencing system” left by the repeal of discretionary judicial review of sentences under old Rule 35(b) while providing a “safety valve” otherwise unavailable.⁷⁰ “The approach taken keeps the sentencing power in the judiciary where it belongs, yet permits later review of sentences in particularly compelling situations.”⁷¹

Congress expressly delegated to the Commission the task of describing and providing examples of “extraordinary and compelling reasons.”⁷² Until 2007, however, the Commission failed to do so, leaving the BOP to create and apply its own criteria. The BOP’s policies created in that gap time were so restrictive that motions were rarely filed and many individuals died before the agency even decided whether to file.⁷³ Federal defenders and advocacy groups pointed out the numerous ways in which the BOP rules thwarted congressional intent, particularly because the BOP’s policies allowed it to assess other factors, besides the

existence of extraordinary and compelling reasons, and to refuse to exercise its motion-filing authority when it thought the motion should be denied (which was almost always).⁷⁴ The BOP's implementation of compassionate release was recognized as a miserable failure, resulting in needless and expensive incarceration.⁷⁵

In 2016, the Commission expanded the definition of "extraordinary and compelling reasons" and "encouraged" the BOP in its gatekeeper role to bring motions for reduction in sentence more frequently, whenever a person met the Commission's criteria.⁷⁶ The Commission also noted that the BOP could find that extraordinary and compelling reasons existed beyond those explicitly identified by the Commission.⁷⁷ But the BOP's rules, although updated, did not adopt all of the Commission's standards and continued to include prejudging whether the motion should be granted, not simply whether extraordinary and compelling reasons existed.⁷⁸

Then the First Step Act changed everything by providing an avenue for defendant-initiated compassionate release motions.⁷⁹ As the Commission has recognized, the courts have developed a robust area of law construing "extraordinary and compelling reasons" in the absence of an applicable policy statement and have applied those standards during the coronavirus pandemic, resulting in thousands of reduced sentences.⁸⁰ But only 1% of the compassionate release motions originated with the BOP, despite the First Step Act's mechanisms encouraging such filings.

Recommendation 9. The BOP should file compassionate release motions when it factually identifies potential extraordinary and compelling reasons, without prejudging the merits of the sentence reduction, and it should adopt Commission standards while expanding potential reasons for compassionate release.

The Commission should recommend that the BOP administer its part of the compassionate release statute in three ways that assume its proper role while keeping sentencing discretion with the judge.

First, the BOP should act quickly on reduction in sentence requests. The amended statute permits persons in prison to file their own motions directly with the sentencing court thirty days after having submitted a request to the warden. For cases of terminal illness, Congress specifically required even swifter action. The BOP must "notify the defendant's attorney, partner, and family members that they may prepare and submit" a request for compassionate release on the defendant's behalf within seventy-two hours of the diagnosis, and the BOP must process sentence reduction requests in those cases within fourteen days.⁸¹ These provisions should result in the BOP making decisions whether or not to file sentence reduction motions without waiting for exhaustion of prisoners' requests.

Second, the BOP should eliminate the policies under which it prejudges the merits of a compassionate release motion instead of simply identifying the potential factual

bases for extraordinary and compelling reasons. As the Commission and Congress recognize, whether a motion to reduce sentence *should* be granted is purely a judicial question. The BOP's current rules—that require it to assess, for example, whether release would "minimize" the severity of the offense—usurp the judicial role in deciding whether a sentence reduction is warranted under the § 3553(a) factors.

Third, the BOP should incorporate the Commission's examples of "extraordinary and compelling reasons" into its program statement, consistently with Congress's delegation of that authority to the Commission. And the BOP should expand its criteria to include additional factors favoring a finding of extraordinary and compelling reasons for compassionate release, such as the district court's failure to anticipate developments that take place after the first sentence that "produces unfairness to the defendant[.]"⁸²

E. The Sentencing Commission Should Recommend That the BOP Revive the Boot Camp Program, with Sentence Reduction and Expanded Community Corrections as Benefits for Completion

Both Congress and the Commission determined that, to avoid overincarceration of defendants with little criminal history, a sentence to thirty months or less could be served by six months of boot camp, a six-months sentence reduction, and the remaining time in community corrections.⁸³ The boot camp program, also known as "shock incarceration," provided not only substantially less time in prison but a disciplined environment for job training, education, substance abuse treatment, and counseling.⁸⁴ In 2004, with no prior notice, the BOP defunded the program, purportedly for fiscal reasons.⁸⁵ But the slapdash fiscal assessment included no accounting for the huge savings from decreased prison time or for the enormous difference in the lives of individuals with scant criminal history and convictions for low-level offenses who returned to their communities months and years earlier. The BOP should reinstitute this alternative to prison because of the rehabilitative benefits, the reduction of incarceration rates, and the long-term fiscal savings.⁸⁶

Recommendation 10. The BOP should reinstate the boot camp program in accordance with its congressional authorization and the implementing regulation, which include both a six-month sentence reduction and expansion of community corrections.

The Commission promulgated a guideline addressing the boot camp program that is still on the books: U.S.S.G. § 5F1.7. This sentencing option, now illusory, should be available in the real world. The Commission should recommend that the BOP reinstate the boot camp program for people with qualifying offenses who want to participate. By doing so, the BOP would reduce prison costs in the long run and prevent overincarceration.

The program "has the benefit of returning very low risk offenders sooner to their families and their jobs,"

contributing to “inmate family stability, which criminological research shows to be a key element in reducing juvenile delinquency and crime among future generations.”⁸⁷ The boot camp program was well received by almost all participants in the federal system. The Commission should recommend that the BOP both revive and expand the program, identifying eligible inmates upon designation and providing them the opportunity to participate immediately upon the commencement of their sentences, both to offer an incentive for good behavior and to allow earlier placement in residential reentry centers.

F. The Sentencing Commission Should Recommend That the BOP Fully Implement the First Step Act’s Earned Time Credit Program (18 U.S.C. § 3632)

A major innovation of the First Step Act was the new earned time credit program, which allowed eligible individuals in BOP custody to earn earlier transfer to pre-release custody or earlier supervised release by participation in “evidence-based recidivism reduction programming or productive activities.”⁸⁸ The groundbreaking aspect of the new program was its call for a new “risk and needs assessment system” to gauge each person’s recidivism risk and assign them to individualized recidivism-reducing programming based on their “specific criminogenic needs.”⁸⁹ By incentivizing programming, Congress aimed to promote public safety while reducing time behind bars.⁹⁰ The program’s anticipated cost savings from shorter sentences could then be “reinvested” into further recidivism reduction programming.⁹¹

But the BOP’s rollout of the earned time credit system was not smooth: for years, the BOP delayed the implementing regulation and included restrictions that undermined the program’s intent.⁹² The risk assessment tool was also plagued by errors.⁹³ Fortunately, some early glitches have been corrected, and the regulations promulgated in January 2022 take a more expansive approach to awarding and applying credits. However, three areas should be the subject of Commission recommendations.

Recommendation 11. The BOP should expand funding for the rehabilitative programs that result in lower PATTERN scores.

PATTERN, the risk assessment tool adopted by the BOP to assess each individual’s risk of recidivism, is a key part of the earned time credit program. PATTERN uses both static and dynamic factors to score individuals into four categories of recidivism risk: minimum, low, medium, and high.⁹⁴ Those categories are critical to earning time credits and receiving the intended benefits. Minimum- and low-risk individuals earn more credits for every thirty days of programming, and they receive the benefit of an actual sentence reduction when sufficient credits are accrued.⁹⁵ Medium- and high-risk individuals, by contrast, earn fewer credits, they can only receive earlier pre-release custody, not an actual sentence reduction, and there are additional barriers to obtaining that benefit.⁹⁶

As a result, it is critically important that individuals have a realistic opportunity to reduce their recidivism risk category while they are serving their sentences. In fact, Congress required that the risk assessment system be “dynamic,” such that scores “can reasonably be expected to change” on the basis of progress and regression in prison.⁹⁷ Thus, PATTERN scores go down when individuals complete rehabilitative, educational, and vocational programming. But prisoners can receive those score reductions only when programming is available—and, too often, the types of programs recognized as effective are either overcommitted or nonexistent in certain facilities.⁹⁸ Full implementation of the First Step Act should include strong recommendations in favor of expanded availability of the types of programs that reduce recidivism.⁹⁹

Recommendation 12. The BOP should promulgate rules for transferring individuals with medium- and high-risk scores to pre-release custody so long as they have maintained good institutional conduct and have productively engaged in available programming.

By statute, individuals assessed as minimum- or low-risk under PATTERN can easily apply their credits to obtain earlier release or transfer to pre-release custody.¹⁰⁰ By contrast, those assessed as medium- or high-risk must satisfy additional criteria. Specifically, they must have shown a “demonstrated recidivism risk reduction,” and they must have a transfer petition approved by the warden after the determination that

- (aa) the prisoner would not be a danger to society if transferred to pre-release custody or supervised release;
- (bb) the prisoner has made a good faith effort to lower recidivism risk through participation in recidivism reduction programs or productive activities; and
- (cc) the prisoner is unlikely to recidivate.¹⁰¹

At present, the BOP has no existing policy or regulation governing the exercise of this “warden exception.” Instead, the BOP has treated those with medium and high PATTERN scores as categorically ineligible for transfer to pre-release custody. In other words, only those prisoners who are both eligible to earn time credits based on their offense of conviction *and* assessed as minimum- or low-risk are currently receiving any benefit from the First Step Act’s programming incentive. That amounts to just one in five prisoners (20.49%).¹⁰² This is particularly problematic given that the PATTERN scoring system is not racially neutral. Well over half of African American men in custody (57%) are scored as medium- or high-risk, compared to just one-third of white men (35%).¹⁰³

But there are many prisoners who, despite scoring higher on PATTERN, have demonstrated through good prison conduct, completion of prison programming, and individualized evaluations that they do not constitute a significant risk in the community. The BOP should adopt a policy for exercising the warden discretion identified in

the statute that includes factors evidencing efforts to reduce recidivism risk, such as no disciplinary write-ups for the previous twelve months, responsible prison job performance, and completion of rehabilitative programs.

Recommendation 13. *The BOP should revoke its informal rule that purports to categorically exclude persons with detainees and eighteen months or less remaining on their sentences from eligibility for sentence reductions based on earned time credits.*

On September 8, 2022, the BOP, in an informal inmate message, announced the categorical exclusion of two groups from sentence reductions based on earned time credits: (1) persons with eighteen months or less remaining on their sentences and (2) persons with detainees.¹⁰⁴ Both groups were statutorily eligible for sentence reductions before the BOP adopted the general disqualifications. These dramatic new restrictions, issued in violation of the Administrative Procedure Act's notice-and-comment requirements, promote unwarranted sentencing disparity, undermine congressional policies, and probably violate the underlying provisions of the First Step Act. The Commission should recommend that the informal rule be dropped.

IV. Conclusion

Congress instructed the Sentencing Commission to recommend changes to the nature or capacity of the BOP. These recommendations should include that the BOP administratively change practices that are resulting in defendants spending too much time in prison, receiving less rehabilitative programming, and wasting millions in taxpayer dollars. Right now, sentenced persons are spending more time in prison than is necessary to accomplish the legitimate goals of sentencing, often resulting in unwarranted sentencing disparities. Through greater funding of rehabilitative programs, which can lower the time in prison for some, the BOP's long-term fiscal interests are served while assuring that statutory rehabilitative goals and methods are not shortchanged or abandoned. At this critical juncture, with both a newly constituted Commission and a newly installed BOP Director, the Commission should offer the BOP a full range of statutorily permitted recommendations that will ameliorate the overuse of prison and promote the greater use of community corrections.

Notes

¹ S. Rep. No. 98-225, at 175 (1983).

² Government Accountability Office, Bureau of Prisons: Eligibility and Capacity Impact Use of Flexibilities to Reduce Inmates' Time in Prison (Feb. 2012); Thomas W. Hillier III et al., Federal Public and Community Defenders, GAO Report Reveals Multiple Ways to End the Waste of Millions on Unnecessary Overincarceration (Apr. 4, 2012).

³ 28 U.S.C. § 994(g).

⁴ "The United States has less than 5 percent of the world's population, yet nearly 25 percent of its prisoners." American Bar Association, ABA Ten Principles to Reduce Mass Incarceration (Aug. 2022) (adopted by the House of Delegates in Revised Resolution 604).

⁵ Recognizing that the statutory fifty-four days in 18 U.S.C. § 3624(b) is almost exactly 15% of 365, the Commission adjusted the ranges in the Sentencing Table for good time credit "that would be earned under the guidelines" by adding 15% to the baseline. U.S. Sentencing Comm'n, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 23 (1987).

⁶ Max Hellman, *Barber v. Thomas: The Supreme Court's Interpretation of the Federal Good Time Credits Statute is Undermining Sentencing Reform*, 42 McGeorge L. Rev. 873, 879-80 (2011).

⁷ First Step Act of 2018, Pub. L. No. 115-391, § 102(b)(1)(B), 132 Stat. 5194, 5210-13 (Dec. 21, 2018); Staff of S. Comm. on the Judiciary, 115th Cong., S.3649, The First Step Act Section-by-Section Summary 3 (Nov. 15, 2018) ("Amends Section 3624 of title 18 of the U.S. Code to clarify congressional intent behind good time credit[.]" (emphasis added)).

⁸ "And if the only way to call attention to the human implications of this case is to speak in terms of economics, then it should be noted that the Court's interpretation comes at a cost to the taxpayers of untold millions of dollars." *Barber v. Thomas*, 560 U.S. 474, 494 (2010) (Kennedy, J., dissenting).

⁹ U.S. Dep't of Justice, An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories 4 (Feb. 1994).

¹⁰ Annual Determination of Average Cost of Incarceration Fee, 86 Fed. Reg. 49060 (Sept. 2, 2021); Home Confinement Under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, 87 Fed. Reg. 36787 (Aug. 31, 2021).

¹¹ 18 U.S.C. § 3624(c) (1987). The statute also institutionalized cooperation with the probation office during this transition, now codified as 18 U.S.C. § 3624(c)(3): "The United States Probation System shall, to the extent practicable, offer assistance to a prisoner during such prerelease custody."

¹² Crime Control Act of 1990, Pub. L. No. 101-647, § 2902, 104 Stat. 4789, 4913; 18 U.S.C. 3624(c) (1990) ("The authority provided by this subsection may be used to place a prisoner in home confinement.").

¹³ 18 U.S.C. § 3624(c) (2008).

¹⁴ 18 U.S.C. § 3624(c)(1) and (2) (2008).

¹⁵ 34 U.S.C. § 60541.

¹⁶ 34 U.S.C. § 60541(a)(2)(A).

¹⁷ 34 U.S.C. § 60541(c)(2).

¹⁸ First Step Act of 2018, Pub. L. No. 115-391, § 601, 132 Stat. 5194, 5237 (2018); 18 U.S.C. § 3621(b) (2018).

¹⁹ 18 U.S.C. § 3624(c)(2) (2018) (emphasis added).

²⁰ 18 U.S.C. § 3624(g)(11).

²¹ Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 12003(b)(2), 134 Stat. 281, 516 (2020).

²² Statement of David E. Patton, Before the Judiciary Committee of the House of Representatives Subcommittee on Crime, Terrorism, and Homeland Security, Oversight Hearing on "The Federal Bureau of Prisons and Implementation of the First Step Act," at 10-11 and Exhibit B (Oct. 17, 2019)

²³ *Id.*, Exhibit B at 4-6.

²⁴ 18 U.S.C. § 3624(c)(6) (2008) (emphasis added).

²⁵ *Sacora v. Thomas*, 628 F.3d 1059, 1063 (9th Cir. 2010) (citing Pre-Release Community Confinement, 73 Fed. Reg. 62440-01 (Oct. 21, 2008) (codified at 28 C.F.R. §§ 570.20-.22)).

²⁶ See *Sacora*, 628 F.3d at 1063-64 (describing the informal rules).

²⁷ *Id.* at 1065 ("The district court granted the petition [for class of federal habeas petitioners] with respect to the BOP's formal regulations, 28 C.F.R. §§ 570.20-.22, finding that the BOP's failure to use notice-and-comment provisions in promulgating those regulations violated the [Administrative Procedure Act], and enjoined the BOP from considering inmates for placement in RRCs pursuant to those regulations.").

- 28 See Pre-Release Community Confinement, 76 Fed. Reg. 58197-01 (Sept. 20, 2011).
- 29 Crime Control Act of 1990, Pub. L. No. 101-647, § 2903, 104 Stat. 4789, 4913 (codified at 18 U.S.C. § 3621(b)).
- 30 Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 32001, 108 Stat. 1796, 1897 (codified at 18 U.S.C. § 3621(e)).
- 31 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).
- 32 U.S. Sentencing Comm'n, Recidivism and Federal Bureau of Prisons Programs: Drug Program Participants Released in 2010 5 (May 2022).
- 33 18 U.S.C. § 3621(e)(1)(C).
- 34 18 U.S.C. § 3621(e)(5)(i) and (ii).
- 35 18 U.S.C. § 3621(e)(5)(A).
- 36 18 U.S.C. § 3621(e)(2).
- 37 BOP Program Statement 5330.10, Drug Abuse Programs Manual, Inmate, Ch. 6 at 2 (May 25, 1995) (completion of applicable transitional services programs required for sentence reduction).
- 38 Drug Abuse Treatment Programs: Early Release Consideration, 61 Fed. Reg. 25121-01 (May 17, 1996); BOP Program Statement 5330.10, Change Notice, Ch. 6 at 7.3 (May 17, 1996).
- 39 Letter from Melvin Sabshin, M.D., Medical Director, American Psychiatric Association, to Kathleen Hawk, Director, Bureau of Prisons (July 18, 1995); Drug Treatment and Intensive Confinement Center Programs: Early Release Consideration, 65 Fed. Reg. 80745-01, 80746 (Dec. 22, 2000) ("The comment by the American Psychiatric Association on the adequacy of transitional services became the basis for the second interim rule.").
- 40 Letter from Steven M. Mirin, M.D., Medical Director, American Psychiatric Association, to Kathleen M. Hawk Sawyer, Director, Bureau of Prisons, at 2 (June 21, 2000).
- 41 BOP Program Statement 5330.11, Early Release Procedures Under 18 U.S.C. § 3621(e), § 2.5.1(b) (Mar. 16, 2009).
- 42 Drug Abuse Treatment Program: Subpart Revision and Clarification and Eligibility of D.C. Code Felony Offenders for Early Release Consideration, 74 Fed. Reg. 1893 (Jan. 14, 2009). The Commission itself adopted this statistical illusion in its description of RDAP in the May 2022 report on RDAP.
- 43 U.S. Sentencing Comm'n, Annual Report and Sourcebook of Federal Sentencing Statistics tbl.9 (2021); see Fed. Bureau of Prisons, Inmate Citizenship (Aug. 2022) (16% of the prison population are from other countries).
- 44 Conf. Rep. to Consolidated Appropriations Act of 2010, *supra* note 30.
- 45 653 F.3d 970, 976 (9th Cir. 2011).
- 46 28 C.F.R. § 550.54(a)(1)(ii) (Incentives for RDAP participation).
- 47 See 18 U.S.C. § 3632(d)(4)(A); 18 U.S.C. § 3624(g).
- 48 28 C.F.R. § 550.55(b)(5)(ii).
- 49 28 C.F.R. § 550.58 (May 1995).
- 50 BOP Program Statement No. 5162.02 (July 24, 1995).
- 51 The initial decisions from the Ninth Circuit held that gun possessors were statutorily eligible. *Downey v. Crabtree*, 100 F.3d 662, 663 (9th Cir. 1996); *Davis v. Crabtree*, 109 F.3d 566, 569 (9th Cir. 1997). The Circuits came to conflicting conclusions, with the majority following the Ninth Circuit's lead.
- 52 *Jacks v. Crabtree*, 114 F.3d 983, 985 n.2 (9th Cir. 1997) ("Here, the Bureau concedes that petitioners are eligible under section 3621(e)(2)(B), but argues that they are ineligible under the Bureau's regulation creating an additional eligibility requirement."); BOP Program Statement No. 5330.10 Ch. 6 at 1 (Oct. 9, 1997); 62 Fed. Reg. 53690-01 (Oct. 15, 1997).
- 53 *Lopez v. Davis*, 531 U.S. 230, 244 (2001).
- 54 *Paulsen v. Daniels*, 413 F.3d 999, 1005-06 (9th Cir. 2005); *Bohner v. Daniels*, 243 F. Supp. 2d 1171, 1174-76 (D. Or. 2003).
- 55 *Arrington v. Daniels*, 516 F.3d 1106, 1114 (9th Cir. 2008).
- 56 *Peck v. Thomas*, 697 F.3d 767, 773 (9th Cir. 2012).
- 57 U.S. Sentencing Comm'n, *supra* note 31.
- 58 BOP Program Statement 5880.28 (July 19, 1999).
- 59 18 U.S.C. § 3585(b).
- 60 Megan Shields Casturo, Comment, *Civil Immigration Detention: When Civil Detention Turns Carceral*, 122 Penn. St. L. Rev. 825, 835 (2018) ("[I]mmigration detention facilities are notorious for their carceral conditions.").
- 61 BOP Program Statement 5880.28, at 1-15A (Sept. 20, 1999).
- 62 *Zavala v. Ives*, 785 F.3d 367 (9th Cir. 2015).
- 63 Henry J. Sadowski, Interaction of Federal and State Sentences When the Federal Defendant Is Under State Primary Jurisdiction 1 (Nov. 18, 2009).
- 64 Stephen R. Sady, *State Sovereignty and Federal Sentencing: Why De Facto Consecutive Sentencing by the Bureau of Prisons Should Not Survive Bond v. United States*, 27 Fed. Sent'g Rep. 56, 59 (Oct. 2014).
- 65 The concurrency decision "concerns a matter of discretion traditionally committed to the Judiciary," and therefore, should not "be left to employees of the same Department of Justice that conducts the prosecution." *Setser v. United States*, 566 U.S. 231, 236, 242 (2012) (citing *Oregon v. Ice*, 555 U.S. 160, 168-69 (2009)).
- 66 U.S.S.G. §§ 5G1.3(b), (d); 5K2.23; see also U.S.S.G. § 5G1.3, Application Note 4(E) ("[A]void confusion with the [BOP]'s exclusive authority under" § 3585(b) by noting in the judgment that departure to achieve concurrency not be described as credit for time served).
- 67 Brief of Respondent, *Schleining v. Thomas*, 642 F.3d 1242 (9th Cir. 2011) (No. 10-35792), 2011 WL 991513, *30; accord Brief of Respondent, *Lopez v. Terrell*, 654 F.3d 176 (2d Cir. 2011) (No.10-2079), 2011 WL 680803, *8. In *Lopez*, the court reversed the district court based on deference to the BOP; in *Schleining*, the court noted the lack of BOP rules directly addressing the question.
- 68 In *Witte v. United States*, the Court noted § 5G1.3's overall purpose of avoiding disproportionate sentencing by seeking to "approximate the total penalty that would have been imposed had the sentences for the different offenses been imposed at the same time (i.e., had all of the offenses been prosecuted in a single proceeding)." 515 U.S. 389, 404-05 (1995); see *United States v. Wilson*, 503 U.S. 329, 334 (1992) (no reason for pre-sentence detention credit "to depend on the timing of sentencing").
- 69 18 U.S.C. § 3582(c)(1)(A)(i) (1987).
- 70 Comprehensive Crime Control Act of 1983, Hearing on S. 829 before the Subcomm. on Criminal Law of the S. Comm. on the Judiciary, 98th Cong., at 491 (1983); Sen. Comm. on Judiciary, S. Rep. 98-225, 98th Cong., 1st Sess., at 121 (1983), 1984 U.S.C.C.A.N. 3182, 3304.
- 71 1984 U.S.C.C.A.N. at 3304.
- 72 28 U.S.C. § 994(t).
- 73 See generally Hum. Rts. Watch & Fams Against Mandatory Minimums, The Answer Is No: Too Little Compassionate Release in US Federal Prisons (Nov. 2012); Mary Price, A Case For Compassion, 21 Fed. Sent'g Rep. 170 (2009); Stephen 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'g Rep. 167 (2009).
- 74 See Comments on Docket No. BOP 1168, 28 CFR part 571, Compassionate Release, at 4 (Feb. 3, 2014) ("[T]he structure and legislative history of the sentence reduction authority, 18

U.S.C. § 3582(c)(1)(A), leave little doubt that Congress intended that the Bureau's role be limited to identifying prisoners with extraordinary and compelling circumstances and of bringing their cases to the courts.”).

⁷⁵ U.S. Dep't of Justice, Evaluation & Inspection Div., I-2013-006, The Federal Bureau of Prisons' Compassionate Release Program 11 (2013) (“The BOP does not properly manage the compassionate release program, resulting in inmates who may be eligible candidates for release not being considered.”).

⁷⁶ U.S.S.G. § 1B1.13 (2016).

⁷⁷ U.S.S.G. § 1B1.13, Application Note 1(D).

⁷⁸ BOP Program Statement 5050.50, *Compassionate Release/Reduction in Sentences* (Jan. 17, 2019). For example, Section 7 of the current program statement requires the BOP to consider the individual's “personal history,” the individual's age at the time of the offense, and “whether release would minimize the severity of the offense.”

⁷⁹ First Step Act of 2018, Pub. L. No. 115–391, § 603(b), 132 Stat. 5194, 5239 (2018).

⁸⁰ U.S. Sentencing Comm'n, *Compassionate Release Data Report, Fiscal Year 2020 to 2021* (2022).

⁸¹ 18 U.S.C. § 3582(d)(2)(A). For cases of a physical or mental disability, the amended statute includes requirements of family notification and assistance, but it does not require the same swift timeline. 18 U.S.C. § 3582(d)(2)(B).

⁸² *Setser*, 566 U.S. at 243.

⁸³ 18 U.S.C. § 4046; 28 C.F.R. § 524.31(b); U.S.S.G. § 5F1.7.

⁸⁴ 18 U.S.C. § 4046(b).

⁸⁵ *Serrato v. Clark*, 486 F.3d 560, 569–70 (9th Cir. 2007).

⁸⁶ See Miles D. Harer & Jody Klein-Saffran, U.S. Dep't of Justice, Fed. Bureau of Prisons, *Evaluation of Post-Release Success for the First 4 Classes Graduating from the Lewisburg Intensive Confinement Center 6–7* (1996) (the federal boot camp program had “demonstrated success regarding low rearrest rates” and resulted in “substantially lower” recidivism rates than similar state programs).

⁸⁷ *Id.* at 2.

⁸⁸ 18 U.S.C. § 3632(d)(4).

⁸⁹ 18 U.S.C. § 3632(a).

⁹⁰ H.R. Rep. No. 115–699, at 22 (2018) (recognizing that “the vast majority of federal prisoners will one day be released from BOP custody” and that it is in “the fiscal interest of the government to reduce recidivism [and] in the public safety interest as well[.]”

⁹¹ *Id.*

⁹² See *Cazares v. Hendrix*, 575 F. Supp. 3d 1289, 1299–1302 (D. Or. 2021) (granting partial habeas corpus relief based on the BOP's failure to implement statutory language in a timely manner).

⁹³ U.S. Dep't of Justice, Office of Justice Programs, 2020 Review and Revalidation of the First Step Act Risk Assessment Tool 5–7 (Jan. 2021).

⁹⁴ U.S. Dep't of Justice, Office of Justice Programs, 2021 Review and Revalidation of the First Step Act Risk Assessment Tool 28 (Dec. 2021).

⁹⁵ See generally 18 U.S.C. § 3632(d)(4)(A); 18 U.S.C. § 3624(g).

⁹⁶ *Id.*

⁹⁷ 18 U.S.C. § 3631(b)(4)(C).

⁹⁸ See First Step Act Independent Review Comm., Report of the Independent Review Committee Pursuant to the Requirements of Title I Section 107(g) of the First Step Act (FSA) of 2018 (P.L. 115–391) 2–3 (Dec. 21, 2020) (finding insufficient program availability both during the pandemic and after an anticipated return to pre-pandemic levels).

⁹⁹ Although PATTERN was validated by a small list of programs that existed before the First Step Act, the current version of PATTERN score reduction should also account for all types of rehabilitative programs now deemed eligible for earned time credit.

¹⁰⁰ 18 U.S.C. § 3624(g).

¹⁰¹ 18 U.S.C. § 3624(g)(1)(D)(II).

¹⁰² U.S. Dep't of Justice, Office of the Att'y Gen., First Step Act Annual Report 26 (Apr. 2022).

¹⁰³ *Id.*

¹⁰⁴ Walter Palvo, *Bureau of Prisons' Interpretation of First Step Act Will Leave Thousands of Inmates Incarcerated*, *Forbes* (Sept. 9, 2022).