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UNITED STATES SENTENCING COMMISSION SYMPOSIUM ON ALTERNATIVES TO INCARCERATION

THE SENTENCING COMMISSION, THE BUREAU OF PRISONS, AND THE NEED FOR FULL IMPLEMENTATION OF EXISTING AMELIORATIVE STATUTES TO ADDRESS UNWARRANTED AND UNAUTHORIZED OVER-INCARCERATION

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Over-incarceration of federal prisoners takes a huge societal toll: the hundreds of millions of taxpayer dollars wasted; the human costs of individual freedom lost and families broken; and the redefinition of our society as one willing to incarcerate more than is necessary to accomplish legitimate goals of sentencing. The overarching philosophy of the Sentencing Reform Act – "a sentence sufficient but not greater than necessary" to accomplish the goals of sentencing[1] – applies to imposition and execution of the sentence. The sooner a prisoner begins community corrections, then supervised release, the sooner community-based rehabilitative programs, with their lesser costs, employment, and family reunification, go into effect. Even without any reduction in the Guidelines or creation of new programs, the Sentencing Commission can eliminate thousands of years of unnecessary incarceration by working with the Bureau of Prisons (BOP) to fully implement existing statutes in a way that assures that prisoners are not serving more time of actual incarceration than is necessary. Failing that, the Sentencing Commission should explicitly authorize adjustment of the sentence to address over-incarceration.

The areas in which existing statutes are not being fully implemented to accomplish their ameliorative purposes are easily identified:

- The BOP applies the federal statute on good time credits, intended by Congress to award good time reductions at 15% of the sentence imposed, at the rate of 12.8% of the sentence imposed, while the Sentencing Commission calibrated the Sentencing Table at the congressionally mandated 15%, resulting in over 36,000 years of over-incarceration;

- The BOP fails to provide the sentence reduction incentive for thousands of addicted non-violent offenders by implementing rules that disqualify statutorily eligible prisoners who successfully complete in-prison substance abuse treatment;

- The BOP does not provide the mechanism for implementing the Sentencing Commission's guideline on sentence reductions for "extraordinary and compelling circumstances," leaving thousands of the most deserving prisoners – including the most ill and infirm – in prison instead of the community; and

- The BOP unilaterally discontinued the boot camp program that the Sentencing Commission recognized as a sentencing option that provided for both a sentence reduction and extended community corrections for non-violent offenders with limited prior records;

[1] 18 U.S.C. § 3553(a) (2000).

- The BOP's rules on sentence computation create de facto consecutive sentences despite state judgments that the time should run concurrently, fail to provide good time against the concurrent part of sentences where the time was served before the imposition of sentence, and institute dead time by refusing to credit time in administrative detention in immigration cases;

- The BOP consistently underutilizes community corrections, even after the Second Chance Act extended to one year the guarantee of consideration for community corrections at the end of sentences to provide greater transition programming.

What follows is a description of each of the programs that, if fully implemented, would greatly reduce incarceration, thereby freeing scarce resources for effective in-prison rehabilitative programs. After the description, there is a Savings section, with rough estimates from public sources and suggestions on how to determine the amount of unnecessary incarceration, and a Litigation Background section.

The Sentencing Commission should recommend to the BOP that all statutes be implemented as designed to maximize the lenity contemplated by their enactment. If the BOP fails to adequately respond, the Sentencing Commission should promulgate appropriate policy statements recommending compensatory sentence reductions. Full implementation of ameliorative statutes is necessary to comply with the congressional mandate of 18 U.S.C. § 3553(a) that the courts impose no more incarceration than necessary to achieve the purposes of punishment. Full implementation also addresses directives to the Commission to "measur[e] the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing" under 28 U.S.C. § 991(b)(2), to provide analysis regarding "maximum utilization of resources to deal effectively with the Federal prison population" under 28 U.S.C. § 994(q), and to "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons" under 28 U.S.C. § 994(g).

A. Good Time Credits Should Be Awarded On The Same Basis As Used By The Sentencing Commission In The Calibration Of The Sentencing Table.

For at least a century, federal sentencing law has calculated good time credits based on the sentence imposed to provide an incentive for good conduct in prison.[2] Prior to 1987, when the Sentencing Reform Act (SRA) went into effect, the good time credit statute

[2] *See Story v. Rives*, 97 F.2d 182, 183-84 n. 1 (D. C. Cir. 1938) (tracing the statute's origins to at least 1875).

provided for graduated available credits per month depending on the length of the sentence.[3] In the SRA, Congress purported to simplify the process by enacting 18 U.S.C. § 3624(b), which provided that prisoners serving a term of imprisonment greater than one year "may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment . . ."[4] Because 54 is almost exactly 15% of the 365 days in a year, the congressional rule appeared to be that, for any term of imprisonment of one year and a day or greater, a prisoner could earn up to 15% of the sentence imposed in good time credits, so the minimum term that must be served on any sentence is 85%.[5]

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[3] The statute had five levels for deductions from the term imposed:

> Five days for each month, if the sentence is not less than six months and not more than one year.
>
> Six days for each month, if the sentence is more than one year and less than three years.
>
> Seven days for each month, if the sentence is not less than three years and less than five years.
>
> Eight days for each month, if the sentence is not less than five years and less than ten years.
>
> Ten days for each month, if the sentence is ten years of more.

18 U.S.C.§ 4161 (repealed 1987).

[4] 18 U.S.C. § 3624(b) (2000). The legislative history refers to "the complexity of current law" and the need to award good time credit at an "easily determined rate." S. REP. No. 98-225, at 147 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, at 3330.

[5] Senator Biden later described the methodology as follows:

> I was the coauthor of that bill. In the Federal courts, if a judge says you are going to go to prison for 10 years, you know you are going to go to prison for at least 85 percent of that time - 8.5 years, which is what the law mandates. You can get up to 1.5 years in good time credits, but that is all. And we abolished parole. So you know you'll be in prison for at least 8.5 years.

141 CONG. REC. S2348-01, at 2349 (daily ed. Feb. 9, 1995) (statement of Sen. Biden); *see also* 131 CONG. REC. E37-02 (daily ed. Jan. 3, 1985) (statement of Rep. Hamilton) ("Now sentences will be reduced only 15% for good behavior."); 131 CONG. REC. E201-04 (daily ed. Jan. 24, 1985) (statement of Rep. Mazzoli) ("[A] sentence could be shortened 15 percent for good behavior."); 131 CONG. REC. S4083-03 (daily ed Apr. 3, 1985) (statement of Sen.

Along with the good time statute, the SRA delegated to the Sentencing Commission the creation of the Sentencing Table, requiring "that, as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served."[6] In calibrating the Sentencing Table, the Sentencing Commission's staff collected large samples of sentences for various crimes and determined the actual time served as a baseline.[7] The Sentencing Commission then "adjusted for good time" by figuring out the longer sentence for which actual time served would be 85%:

> Prison time was increased by dividing by 0.85 good time when the term exceeded 12 months. This adjustment corrected for the good time (resulting in early release) that would be earned under the guidelines. This adjustment made sentences in the Levels Table comparable with those in the guidelines (which refer to sentences prior to the awarding of good time).[8]

The Sentencing Commission incorporated its interpretation of the good time statute in a 1990 amendment to the introduction to the Guidelines manual, stating "[h]onesty is easy to achieve: the abolition of parole makes the sentence imposed by the court the sentence the offender will serve, less approximately fifteen percent for good behavior."[9]

For about a decade after the SRA became effective on November 1, 1987, prosecutors, defense attorneys, and judges generally predicted actual minimum time served by multiplying by .85 the potential term of imprisonment in months to calculate the time a defendant, receiving maximum good time, would actually serve before commencing the term of

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Kennedy) (under the Act, the "sentence announced by the sentencing judge will be for almost all cases the sentence actually served by the defendant, with a 15 percent credit for 'good time.'").

[6] 28 U.S.C. § 994(m) (2000).

[7] United States Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements*, 23 (1987).

[8] *Id.*

[9] U.S.S.G. ch. 1, pt. A, § 3 (1990 Amendment) (2007 Guidelines Manual at 9).

supervised release.[10] However, the 85% calculation was not accurate: internal documents from the BOP indicate that in 1988, the BOP took the position that "good time is earned on sentences of one year and one day or more at a rate of 54 days *for each year of time served*."[11] By counting good time credits against time served, rather than the sentence imposed, the BOP disallowed seven days of potential good time credit. Following an "arithmetically complicated" formula,[12] the BOP's methodology provides only a maximum of 47 days against the sentence imposed as maximum good time credits, or allowing no more than 12.8% of the sentence imposed as good time reductions.[13] Therefore, the minimum amount of time that a well-behaved prisoner would serve, with full good time credits, equals 87.2% of the sentence imposed, not 85%.

The BOP never made a reasoned decision to construe the statute more harshly – the BOP simply assumed the statute unambiguously required the lesser amount of good time credits. Further, there is no indication that the BOP ever took into consideration that the Sentencing Commission had previously interpreted the statute to provide the full 54 days against each year of the time imposed, or that the Sentencing Table, upon which all sentences are initially graphed, was calibrated to be 2.2% higher on the assumption that 15% good time credits on the sentence imposed would be available, not the 12.8% allowed by the BOP.

Prisoners today serve actual time at a rate 2.2% higher than the baseline set by the Sentencing Commission. There is nothing to stop the Commission from adjusting sentences to reduce the baseline found under the Guidelines, either by recalibrating the Sentencing Table or by promulgating a policy statement authorizing a 2.2% reduction. The easier course, and the one contemplated by the statutes, would be for the BOP to grant the same amount of good time assumed by the Sentencing Commission in setting the Sentencing Table. The Sentencing Commission was specifically delegated the task of construing the

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[10] The incorrect 85% still appears in cases as well as BOP rules. *See*, *e.g.*, *United States v. Pate*, 321 F.3d 1373, 1375 n.1 (11th Cir. 2003) ("Actually, he would serve 85% based on the 15% reduction as provided in 18 U.S.C. § 3624(b)(1)."); Bureau of Prisons Program Statement 5100.08, Ch. 4, at 6 (Sept. 12, 2006) ("Based on the inmate's sentence(s), enter the total number of months remaining, less 15% (for sentences over 12 months), and credit for any jail time served.").

[11] Bureau of Prisons Program Statement 5880.28 at 1-44 (Feb. 14, 1997) (emphasis added).

[12] *Id*.

[13] *Id*. at 46-47.

provisions of the SRA that include the good time credit statute.[14] The Sentencing Commission has an institutional obligation to assure that the task delegated under the SRA, and the integrity of the Sentencing Table, is respected by the agency with the ministerial task of executing the good time credit statute, or that the empirical error be corrected within the Guidelines.

Savings

The seven days per year seems small until measured against the number of persons affected and the length of sentences imposed. For all federal prisoners eligible for good time, the total time involved is over 36,000 years (201,386 prisoners x 7 days a year x 9.5 average sentence that is more than a year and less than life, divided by 365 days in a year equals 36,691 years).[15] At $24,922 per year for non-capital incarceration expenditures, this amounts to over $914 million in taxpayer money that Congress did not intend or authorize to expend on incarceration for current prisoners.[16] Put another way, 95% of the approximately 200,000 inmates are eligible for good time credit, so every year the over-incarceration by 7 days, at $68 per day, costs taxpayers approximately $93 million.[17] If prisoners were awarded 54 instead of 47 days per year, the additional beds available would, with no new construction, mitigate dangerous overcrowding in a system that is 37% over capacity.[18]

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[14] In approving Congress's delegations to the Sentencing Commission, the Supreme Court specifically referred to § 944(m) and the direction "to use current average sentences as 'a starting point' for its structuring of the sentencing ranges." *Mistretta v. United States*, 488 U.S. 361, 375 (1989).

[15] Bureau of Prisons, Quick Facts (April 23, 2008), http://www.bop.gov/news/quick.jsp.

[16] Memorandum from Matthew Roland, Deputy Assistant Director, Administrative Office of the United States Courts, Regarding Cost of Incarceration to Chief Probation and Pretrial Officers, (May 6, 2008).

[17] *Id*.

[18] At year end 2006, BOP capacity was 119,243, while the actual population was 190,844 prisoners, so the BOP operated 37% over capacity. U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN, PRISONERS IN 2006, at 4, 5, 20, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/p06.pdf. The BOP population is 201,489 as of June 19, 2008. *See* BOP Weekly Population Report, *available at* http://www.bop.gov/locations/weekly_report.jsp. *See also Fiscal Year 2008 Budget Request for the Federal Bureau of Prisons Before the H. Comm. on Appropriations, Subcomm. on*

Litigation Background

In 1998, a prisoner serving a year and a day sentence for a supervised release violation, discovered that he could receive no more than 47 days on the one year sentence, not the 54 days that appeared in the statute. Upon his petition for habeas corpus, the petitioner argued the statute unambiguously provided 54 days annual credit calculated on the sentence; the BOP argued the statute unambiguously allowed only 47 days. The district judge found that the statute, despite using "term of imprisonment" three times in one sentence – and two times meaning the sentence imposed – was ambiguous.[19] Then, rather than apply the rule of lenity to the penal statute, the court deferred to the agency's construction of the statute. The Ninth Circuit affirmed the district court's reasoning in *Pacheco-Camacho v. Hood*.[20]

The Ninth Circuit decision in *Pacheco-Camacho* was disturbing: every rule of statutory construction favored treatment of "term of imprisonment" the same throughout the statute as the sentence imposed by the district judge. Further, in the context of actual time in custody, the rule of lenity appeared to be a tie breaker rule that should go into effect before any deference to an executive agency.[21] The contrary rule adopted by the Ninth Circuit would "turn the normal construction of criminal statutes upside-down, replacing the doctrine of lenity with the doctrine of severity."[22]

In response to the *Pacheco-Camacho* ruling, lawyers nationally coordinated litigation to pursue the issue.[23] Through the efforts of federal defenders and volunteer lawyers working with Families Against Mandatory Minimums, three district courts ruled that § 3624(b)

Commerce Justice, Science and Related Agencies, 108th CONG (Mar. 27, 2007) (statement of Harley Lappin, Director, Federal Bureau of Prisons).

[19] *Montgomery v. Hood*, No. 00-1350-BR (D. Or. Nov. 3, 2000).

[20] 272 F.3d 1266, 1268 (9th Cir. 2001).

[21] *United States v. Santos*, 128 S.Ct. 2020, 2025 (2008) ("The rule of lenity requires . . . that no citizen should be . . . subjected to punishment that is not clearly prescribed.") (citing *United States v. Gradwell*, 243 U.S. 476, 485 (1917); *McBoyle v. United States*, 283 U.S. 25, 27 (1931); *United States v. Bass*, 404 U.S. 336, 347-49 (1971)).

[22] *Crandon v. United States*, 494 U.S. 152, 178 (1990) (Scalia, J., concurring).

[23] Stephen R. Sady, *Misinterpretation of the Federal Good Time Statute Costs Prisoners Seven Days Every Year*, THE CHAMPION, Oct. 2002, at 12.

unambiguously required that the BOP provide up to 54 days of good time credits against the time imposed by the sentencing judge.[24] The most detailed analysis was provided by Magistrate Judge Stephen W. Smith and District Court Judge Lynn N. Hughes in *Moreland* from the Southern District of Texas.[25]

In the courts of appeals, the pure statutory argument that had been made throughout the country was only partially successful. Almost every court rejected the BOP position that the statute unambiguously required only 47 days against the term of imprisonment imposed.[26] However, using a wide variety of reasoning, the courts generally found the statute to be ambiguous and deferred to the BOP's construction.

The statutory litigation demonstrates the need for further examination of federal good time credits. United States Supreme Court Justice John Paul Stevens explained, in connection with the Court's denial of certiorari in *Moreland*, that the prisoner's statutory interpretation appeared to be correct and that, in the absence of a Circuit split, courts and "other Government officials" should re-examine the BOP's method of computing good time credits:

> I think it appropriate to emphasize that the Court's action does not constitute a ruling on the merits and certainly does not represent an expression of any opinion concerning the wisdom of the Government's position. As demonstrated by the thoughtful [*Moreland*] opinion, both the test and the history of the statute strongly suggest that it was not intended to alter the pre-existing approach of calculating good-time credit based on the sentence imposed. Despite its technical character, the question has sufficient

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[24] *Moreland v. Fed. Bureau of Prisons*, 363 F.Supp.2d 882, 894 (S.D. Tex. 2005); *Williams v. Dewalt*, 351 F.Supp.2d 412, 420 (D. Md. 2004); *White v. Scibana*, 314 F.Supp.2d 834, 841 (W.D. Wis. 2004).

[25] 363 F.Supp.2d at 885-86.

[26] *Sash v. Zenk*, 428 F.3d 132, 134 (2d Cir. 2005); *Mujahid v. Daniels*, 413 F.3d 991, 999 (9th Cir. 2005); *Yi v. Fed. Bureau of Prisons*, 412 F.3d 526, 532-33 (4th Cir. 2005); *O'Donald v. Johns*, 402 F.3d 172, 173-74 (3d Cir. 2005); *Perez-Olivo v. Chavez*, 394 F.3d 45, 49 (1st Cir. 2005); *White v. Scibana*, 390 F.3d 997, 1002-03 (7th Cir. 2004); *Pacheco-Camacho*, 272 F.3d at 1271.

> importance to merit further study, not only by judges but by other Government officials as well.[27]

The Sentencing Commission has thus been invited to weigh in on the BOP's interpretation of the good time statute and, particularly, to consider two key questions left unaddressed in the prior litigation: the Sentencing Commission's prior construction of the statute to provide 54 days against the sentence imposed; and the absence of justification for a harsher interpretation.

In the latest incarnation of the good time credit litigation, both these arguments were presented along with the statutory construction arguments previously rejected.[28] Based on the abundant evidence that the BOP did not treat the statute as ambiguous, the absence of any justification for the harsher interpretation appears to violate § 706 of the Administrative Procedure Act. The case was argued on March 7, 2008, and is currently awaiting a decision by the Ninth Circuit.

B. The Sentence Reduction Of One Year For Successful Completion Of In-Prison Substance Abuse Treatment Should Be Fully Available To All Statutorily Eligible Prisoners.

In 1990, Congress created the outlines for residential substance abuse treatment to address two leading causes of recidivism – alcoholism and drug addiction.[29] When very few prisoners volunteered for the program, Congress in 1994 enacted an incentive of a sentence reduction of up to one year for successful completion of the program.[30] Participation increased greatly. As we can attest from having spoken to hundreds of participants in what is known as RDAP or the Residential Drug and Alcohol Program, the program is excellent at giving prisoners the tools to return to their communities and to live law-abiding lives.

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[27] *Moreland v. Fed. Bureau of Prisons*, 126 S.Ct. 1906, 1907 (2006) (Stevens, J., statement respecting the denial of certiorari).

[28] *Tablada v. Daniels*, 2006 WL 2129783 (D. Or. July 18, 2006), *appeal docketed*, No. 07-35538 (9th Cir. May 24, 2007).

[29] 18 U.S.C. § 3621(b) (2000).

[30] 18 U.S.C. § 3621(e) (2000). This program appears to at least partially respond to a study indicating that non-violent drug offenders were receiving greater punishment than necessary. U.S. DEPARTMENT OF JUSTICE, AN ANALYSIS OF NON-VIOLENT DRUG OFFENDERS WITH MINIMAL CRIMINAL HISTORIES (1994).

In its execution of the incentive, however, the BOP has failed to implement the program to cover the full range of prisoners authorized by statute to receive the sentence reduction. The statute limits eligibility for the sentence reduction to prisoners convicted of a nonviolent offense. In implementing the sentence reduction incentive, the BOP has eliminated three broad categories of statutorily eligible prisoners: any prisoner with a detainer, which eliminates the 26.6% of prisoners who are removable aliens; prisoners whose offense involved mere possession of a firearm, such as felons in possession of a firearm and drug traffickers who receive a two level gun increase; and prisoners convicted of a nonviolent offense but who have prior violent convictions, regardless of how stale. The BOP should allow all statutorily eligible prisoners to participate in the incentive program, with any current and serious dangerousness addressed on an individual, rather than categorical, basis.

1. Prisoners 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.[31] This meant that prisoners with detainers could receive the year off, which makes good sense given that alien detainees often became substance abusers in the United States. Their successful treatment would help them live law-abiding lives in their own countries, while not saddling neighboring countries with untreated substance abusers. 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.[32] The American Psychological Association wrote the BOP a letter suggesting that more frequent treatment sessions should be included.[33] 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.[34] With no indication that any thought was given to prisoners with detainers, the BOP in effect eliminated all aliens, as well as United States citizen prisoners with state detainers, from the sentence reduction incentive. There is no reason why the BOP could not reinstate the requirement of successful

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

[32] 28 C.F.R. § 550.59(a) (1995).

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

[34] *Id.*

completion of transitional programming, in lieu of community corrections, for those prisoners who, due to the existence of a detainer, are not in a position to participate in community corrections.

Litigation Background

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.[35] 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 from the sentence reduction incentive. The American Psychological Association provided a new comment to the BOP objecting to the misuse of the prior comment and providing strong reasons why such eligibility should continue.[36] Nonetheless, the BOP refused to modify its position.[37] As discussed in the following section, the elimination of eligibility of over a quarter of the prison population, with no indication that the rulemakers were even aware of that consequence, should be subject to challenge under § 706 of the Administrative Procedure Act.

2. Gun Possessors

The BOP's rule disqualifying gun possessors appears to have arisen from an initial misinterpretation of the statute. Under its 1995 rules, the BOP adopted a regulation defining nonviolent offense by reference to "crimes of violence" in 18 U.S.C. § 924(c).[38] The BOP then, in program statements, misadvised its personnel that such offenses included simple possession of a firearm by a felon and drug trafficking offenses with a two-level gun specific offense characteristic under U.S.S.G. § 2D1.1(b).[39] After prisoners who believed themselves to be nonviolent offenders filed habeas petitions, the courts generally held that the statute did not categorically disqualify the class of prisoners who merely possessed a firearm. In response, with no empirical evidence in support, and with no APA compliant notice, the BOP

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

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

[37] *Id*. at 80745.

[38] Drug Abuse Treatment Programs: Early Release Consideration, 60 Fed. Reg. 27692-01 (May 25, 1995).

[39] Bureau of Prisons Program Statement 5161.02 (July 24, 1995).

issued an interim rule in October 1997 that purported to disqualify the same individuals as an exercise of the BOP's categorical discretion.[40] In promulgating the final rule in December 2000, the BOP recognized that the class of mere gun possessors are statutorily eligible for the sentence reduction but failed to articulate any rationale or empirical basis for eliminating such admittedly statutorily eligible prisoners from the incentive program.[41]

Litigation Background

The litigation regarding simple gun possessors began in 1995 when two prisoners, Bruce Downey and Albert Davis, could not understand why they were being considered violent offenders when their offenses – drug dealing and being a felon in possession of a firearm – involved no physical violence within the common sense meaning of the term. They filed habeas corpus petitions that were granted in the District Court and Court of Appeals on the theory that the policy statement conflicted with the statute and regulation.[42] Most courts followed *Downey* and *Davis*.[43] Rather than seek certiorari on the statutory question, the BOP issued the October 1997 interim rule.[44]

Litigation on the October 1997 rule began with cases establishing that the rule could not be applied retroactively to prisoners previously determined to be eligible for the sentence

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[40] Drug Abuse Treatment and Intensive Confinement Center Programs: Early Release Consideration, 62 Fed. Reg. 53690 (Oct. 15, 1997); BOP Program Statement 5330.10 (Oct. 7, 1997).

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

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

[43] *Fristoe v. Thompson*, 144 F.3d 627, 631 (10th Cir.1998); *Byrd v. Hasty*, 142 F.3d 1395, 1397-98 (11th Cir.1998); *Martin v. Gerlinski*, 133 F.3d 1076, 1079-80 (8th Cir.1998); *Roussos v. Menifee*, 122 F.3d 159, 162-64 (3d Cir.1997). *But see Pelissero v. Thompson*, 170 F.3d 442, 447 (4th Cir. 1999); *Parsons v. Pitzer*, 149 F.3d 734, 737-39 (7th Cir. 1998); *Venegas v. Henman*, 126 F.3d 760, 763 (5th Cir. 1997).

[44] Drug Abuse Treatment and Intensive Confinement Center Programs: Early Release Consideration, 62 Fed. Reg. 53690-01 (Oct. 15, 1997).

reduction.[45] The litigation then proceeded to generate a Circuit split on whether the October 1997 rule's categorical exercise of discretion violated the face of the statute.[46] The Supreme Court resolved the split in favor of the BOP,[47] but left open the possibility that the rule had been promulgated in violation of the APA.[48]

Oregon litigants who had prevailed at the district court level on the statutory question then proceeded to challenge the October 1997 rule based on the absence of the notice and comment required by the APA. In 2005, they prevailed in *Paulsen v. Daniels*.[49] On December 20, 2000, the BOP promulgated the same interim rule that had been invalidated in *Paulsen* as a final rule, with no material change in the administrative record. This year in *Arrington v. Daniels*, the court held that, in light of the paltry administrative record, the December 2000 final rule was arbitrary, capricious, an abuse of discretion, and contrary to law under § 706 of the APA.[50]

3. Disqualification Based On Prior Convictions

Another group of statutorily eligible prisoners are those with prior convictions for listed violent offenses.[51] A prisoner who is serving his sentence for an undoubtedly nonviolent offense is not eligible for the incentive program based on certain prior convictions, regardless of how old the priors are. The subclass of prisoners who should be

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[45] *Bowen v. Crabtree*, 22 F.Supp.2d 1131 (D. Or. 1998), *aff'd*, *Bowen v. Hood*, 202 F.3d 1211, 1220-22 (9th Cir. 2000).

[46] *Compare Ward v. Booker*, 202 F.3d 1249, 1256-57 (10th Cir. 2000) (finding the firearm disqualification an impermissible exercise of discretion), *and Kilpatrick v. Houston*, 197 F.3d 1134, 1135 (11th Cir. 1999) (same), *with Bellis v. Davis*, 186 F.3d 1092, 1095 (8th Cir. 1999) (finding categorical disqualification based on firearm possession a permissible exercise of discretion), *and Bowen v. Hood*, 202 F.3d 1211, 1220 (9th Cir. 2000) (same).

[47] *Lopez v. Davis*, 531 U.S. 230, 239-41 (2001).

[48] *Lopez*, 531 U.S. at 244 n.6.

[49] 413 F.3d 999, 1004 (9th Cir. 2005).

[50] 516 F.3d 1106, 1113-14 (9th Cir. 2008).

[51] Consideration For Early Release, 28 C.F.R. § 550.58 (1995); Bureau of Prisons Program Statement 5330.10, ch. 6 (May 25, 1995).

most clearly eligible includes those whose prior convictions are so stale they do not count as criminal history.

In the SRA, Congress specifically delegated to the Sentencing Commission the task of deciding what prior convictions categorically have sufficient relevance to affect the length of time actually served; that is, prior convictions that provide the criminal history points considered in reaching a Criminal History Category between I and VI.[52] The Sentencing Commission expressly relied on Parole Commission empirical data in determining that certain sentences over ten or fifteen years old should not count for criminal history points.[53] Given the delegation to the Sentencing Commission of the task of deciding whether the conviction should count toward the length of the current sentence, the BOP's use of stale convictions to eliminate eligibility for the sentencing reduction disregards the empirical conclusion of the body properly delegated to make such decisions. The disqualification of prisoners based on stale convictions would be easily remedied by rule.[54]

The entire question of using prior convictions to disqualify prisoners convicted of a nonviolent offense should also be reexamined. If the sentence has already been enhanced based on a prior conviction, and a sentencing judge already considered the record in imposing sentence, the reduction of up to twelve months still results in a longer sentence for persons based on prior convictions. And these offenders are people who should be given every incentive to participate in a program that can create major changes in their lives and to remove themselves from criminal subcultures, particularly in light of the success of RDAP

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[52] 28 U.S.C. § 994(d)(10) (2000) (criminal history one of the factors considered "only to the extent they do have relevance."); *Mistretta v. United States*, 488 U.S. at 375-76.

[53] U.S.S.G. § 4A1.1 (2007); *see* U.S. SENTENCING COMMISSION, A COMPARISON OF THE FEDERAL SENTENCING GUIDELINES CRIMINAL HISTORY CATEGORY AND THE U.S. PAROLE COMMISSION SALIENT FACTOR SCORE, at 3 (Jan. 4, 2005).

[54] The presentence report, which is the basic source for BOP decisionmaking, would list such convictions as scoring 0 criminal history points. Elimination of stale convictions would also remedy the administrative record, which reflects the misconception that the listing of a prior conviction in a presentence report results from an exercise of discretion. Drug Abuse Treatment and Intensive Confinement Center Programs: Early Release Consideration, 65 Fed. Reg. 80745, at 80746 (Dec. 22, 2000) ("In general, information in the PSI about prior convictions *may* be limited to the fifteen year period covered in the Sentencing Commission History Category.") (emphasis added).

in lowering recidivism rates.[55] Rather than categorically excluding prisoners, the BOP should exercise discretion individually in determining whether there is some reason a person convicted of a nonviolent offense should not receive the statutory incentive.

Litigation Background

The litigation regarding the prior convictions has established that, as a matter of statutory construction, the BOP has authority to disqualify statutorily eligible prisoners.[56] However, litigation is currently pending regarding the disqualification of prisoners based on stale prior convictions under § 706 of the APA.[57] Given the lack of administrative record establishing a rationale or empirical support, the disqualification based on stale prior convictions should be controlled by the reasoning in *Arrington*.

4. Underutilization Of The RDAP Program

The BOP should also take measures to assure that RDAP classes are open and available at a time that permits the maximum amount of sentence reduction to be available. Currently, the BOP only provides an average sentence reduction of 8.2 months for eligible prisoners, rather than the one year available under the statute.[58] Several BOP policies result in this expensive underutilization of the incentive program.

The BOP does not make eligibility determinations early enough to be able to plan to send prisoners to available programs. In creating waiting lists, the BOP does not follow the statutory requirement that "proximity to release" provide the priority: while using the potential for good time credits for a projected release date, the BOP does not use the potential for the RDAP sentence reduction, thereby leaving prisoners to obtain a much reduced period

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[55] 2006 Fed. Bureau of Prisons Annual Report on Substance Abuse Treatment Programs at 8 (Jan. 2007) (male participants are 16 percent less likely to recidivate and 15 percent less likely to relapse than similarly-situated inmates).

[56] *Lopez*, 531 U.S. at 241; *Jacks v. Crabtree*, 114 F.3d 983, 984-85 (9th Cir. 1997).

[57] *Crickon v. Thomas*, 2007 WL 4554326 (D. Or. 2007), *appeal docketed*, No 08-35250 (Jan 17, 2008).

[58] 2006 Fed. Bureau of Prisons Annual Report on Substance Abuse Treatment Programs at 8 (Jan. 2007).

of the sentence reduction.[59] In other words, prisoners who are eligible for the reduction see non-eligible prisoners take their places in programs based on release dates that do not include the one-year reduction. Many eligible prisoners could get into classes earlier and receive the full 12-month reduction if the BOP took their successful completion of the program for granted when calculating projected release dates. Further, the BOP has promulgated inappropriate practices regarding who is an eligible prisoner, disqualifying persons who have not used substances within a year of custody when the addicted person had been complying with pretrial release conditions.[60]

This constellation of administrative impediments often leaves prisoners with a shorter sentence reduction, not because they do not deserve it, but because of the manner of administration. The most important policy approach should be to assure that the treatment programs receive sufficient funding that classes can accept all prisoners who volunteer for such treatment and that the program is administered so all eligible prisoners receive the full one year sentence reduction.

Litigation Background

Several issues regarding implementation of the program that affects the available sentence reduction are currently being litigated. The refusal to evaluate prisoners until thirty-six months before release has been invalidated in several cases.[61] The district courts have split on the question of whether the informal rule requiring use of a substance within one year of custody is lawful.[62] The construction of "proximity to release" in 18 U.S.C. § 3621(e)(1)(C) is pending in district court.[63]

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[59] 18 U.S.C. § 3621(e)(1)(C) ("with priority for such treatment accorded based on an eligible prisoner's proximity to release date").

[60] *See Salvador-Orta v. Daniels*, 531 F.Supp.2d 1249, 1252 (D. Or. 2008).

[61] *Dumlao v. Daniels*, 481 F.Supp.2d 1153, 1155 (D. Or. 2007); *Engel v. Daniels*, 459 F.Supp.2d 1053, 1054 (D. Or. 2006); *accord Wade v. Daniels*, 373 F.Supp.2d 1201, 1204 (D. Or. 2005).

[62] *Salvador-Orta*, 531 F.Supp.2d at 1252 (citing cases).

[63] *Thurman v. Thomas*, No. 06-1400 (D. Or. filed Oct. 2, 2006).

Savings

The centuries of extra incarceration from the categorical disqualification of statutorily eligible prisoners is difficult to quantify because many prisoners who know they will not receive the incentive do not apply for RDAP. The number disqualified by detainers can be extrapolated from the percentage of aliens in federal prison – 26.6% or 53,000 prisoners. A conservative number of those disqualified for gun possession or prior convictions can be gleaned from Attachment J, the form stating the reasons a prisoner is not eligible for the sentence reduction.[64] Over half the prison population was sentenced for drug offenses, more than one quarter of prisoners are non-United States citizens, and nearly 15% of offenders have weapons offenses. Broadening the class of nonviolent offenders eligible for the sentence reduction would result in considerable savings given the annual cost of incarceration.

Although non-violent prisoners are eligible for a one-year sentence reduction, prisoners on average are receiving only 8.2 months against their sentences. The BOP explains that there is a long waiting list for the program, causing delays in prisoners entering the program. The extra four months that the 3,600 prisoners eligible for the sentence reduction stay in prison costs $27.8 million each year.[65] Changing the BOP practice of delaying consideration of prisoners' application to RDAP until end of the sentence would allow for better administration of the program to maximize the amount of the sentence reduction.

RDAP is a highly successful program that reduces recidivism and the risk of relapse.[66] Yet, as the total prison population rises, there has been a decline in the number of prisoners participating in RDAP since 2004.[67] Although the BOP claims that 100% of the eligible prisoners are participating, the BOP's administrative restrictions on eligibility unnecessarily disqualifies statutorily eligible prisoners.

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[64] Bureau of Prisons Program Statement 5330.10 (Oct. 9, 1997), *see also* Bureau of Prisons Program Statement 5381.01 (referring to form BP-5761.055("Notice to Inmate")).

[65] 2006 Fed. Bureau of Prisons Annual Report on Substance Abuse Treatment Programs at 11 (Jan. 2007); Memorandum to Chief from Matthew Rowland, Deputy Assistant Director, *supra*, note 16.

[66] 2006 Fed. Bureau of Prisons Annual Report on Substance Abuse Treatment Programs at 8 (Jan. 2007).

[67] 2006 Fed. Bureau of Prisons Annual Report on Substance Abuse Treatment Programs Att. II (Jan. 2007).

C. Based On The Sentencing Commission's Standard For "Extraordinary And Compelling Circumstances" In U.S.S.G. § 1B1.13, The BOP Should Implement A Process That Facilitates And Does Not Obstruct Sentencing Courts' Discretion To Reduce Sentences.

The SRA's intention to regularize sentences included provisions for later sentence reductions. As illustrated by the recent retroactive crack cocaine amendments, the sentencing court has discretion to reduce a sentence where the Sentencing Commission has determined that a guideline should be reduced and the reduction should apply retroactively.[68] In a less noticed provision, Congress also provided for discretion by the sentencing judge to reduce a sentence where later changes of fact make the sentence too harsh, if the court finds that "extraordinary and compelling reasons warrant such a reduction."[69]

Congress realized that a wide variety of circumstances could fit into the description of "extraordinary and compelling" circumstances in 18 U.S.C. § 3582(c)(1)(A)(i), and delegated to the Sentencing Commission the task of setting criteria and providing examples:

> The Commission, in promulgating general policy statements regarding the sentencing modification provisions in § 3582(c)(1)(A) of Title 18, shall describe what should be considered extraordinary and compelling circumstances for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.[70]

The statute contemplates that the BOP would perform a gatekeeper function: sentencing discretion is to be exercised by the sentencing judge, but the sentencing judge does not receive notice of the case until the BOP files a motion. And this is where practice broke down. The BOP adopted a rule that defense practitioners have called the Death Rattle Rule.[71] Basically, the only circumstance that can be considered "extraordinary and compelling" is imminent proximity to death. The result of the policy is brutal: with almost 200,000 federal prisoners, the BOP recently filed an average of only 46 motions each year in a five year period and, in about 16% of the cases where motions were filed, the prisoner died before a federal judge ruled on the motion.

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[68] 18 U.S.C. § 3582(c)(2) (2000).

[69] 18 U.S.C. § 3582(c)(1)(A)(i) (2000).

[70] 28 U.S.C. § 994(t) (2000).

[71] 28 C.F.R. § 571.60 (1994).

Last year, the Sentencing Commission adopted a rule that, consistent with the statutory language, contains no limit on what can constitute "extraordinary and compelling" circumstances, and sets out examples beyond imminent death. The newly promulgated Guideline lists other examples of circumstances that can meet the statutory standard:

- a permanent physical or medical condition that substantially diminishes the ability of the prisoner to provide selfcare within a prison environment;
- the 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.[72]

Although this Guideline became effective on November 1, 2007, not a single motion has been filed pursuant to the new U.S.S.G. § 1B1.13. The old rule remains on the books, and the BOP, in an interim rule, has not changed a syllable of the basic standard.[73] The BOP to this day is instructing Wardens by rule to deprive sentencing judges of the opportunity to exercise their discretion and is, in effect, assuring that the range of discretion contemplated by the statute is never exercised.

The Sentencing Commission's role is only realized if the BOP administers the statute in a fair and reasonable manner. Under the statutory scheme, the BOP does not decide which cases merit the reduction: the task assigned to the BOP is to provide the sentencing judge with notice and an opportunity to rule any time there are circumstances that could reasonably be considered "extraordinary and compelling."[74] The Sentencing Commission, having made

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[72] U.S.S.G. § 1B1.13, comment. (n.1).

[73] The BOP explicitly stated in the interim rule that the Commission's proposed factors, which had been circulated since May 2006, would not be considered: "It is important to note 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 only consider inmates with extraordinary and compelling medical conditions for [reduction in sentence], and not inmates in other, non-medical situations which may be characterized as "hardships," such as a family member's medical problems, economic difficulties, or the inmate's claim of an unjust sentence." Reduction in Sentence for Medical Reasons, 71 Fed. Reg. 76619-01 (Dec. 21, 2006).

[74] In contrast to the BOP's interim rule, the statute does not provide for the BOP to make a recommendation to the sentencing judge – the statute simply provides for the BOP

such a clear statement contemplating vigorous use of the statute, should take strong remedial action to assure that the tasks delegated to the Commission are realized in the real world by the agency whose ministerial function is simply not being carried out.

Savings

The amount of savings is difficult to quantify but would be substantial. Many of the potential beneficiaries are medically needy and therefore very expensive to house. Given the number of federal districts, even one motion a year per district would double the number of § 3582(c)(1)(A)(i) motions filed per year.

Litigation Background

Almost every federal defender with any amount of experience has come across the tragic situation where, due to events occurring after the imposition of sentence, the term of imprisonment imposed is no longer reasonable or necessary. AFPD John Vanderslice in Nebraska recently had a client who, twelve months short of completion of his sentence, faced the tragedy of needing to attend his 10-year old daughter's death, as she was dying from cancer.[75] A relatively modest sentence reduction would have placed him within the BOP's guidelines for community corrections, which would have allowed him to be with her through the last stages of a frightening and terrible sickness. As the media attention to the story demonstrated, any reasonable construction of "extraordinary and compelling" circumstances would apply to this nonviolent drug trafficker. With no clear mechanism for counsel to return to the sentencing judge, the child died with the father having only been allowed brief furloughs, at his expense, to see her.

Defense attorneys have used a wide array of motions and theories to bring tragic circumstances to the attention of trial judges. For example, through 28 U.S.C. § 2241, the Warden's implementation of § 3582(c)(1)(A)(i) can be challenged and interim relief can be requested; or the failure to provide adequate medical treatment for a person who has taken a radical turn for the worse can assert jurisdiction under 28 U.S.C. § 2255. And sometimes, judges, prosecutors, and defense counsel can arrive at an amended judgment that reasonably addresses the unforeseen circumstances. But what usually happens is that the extraordinary and compelling circumstances are ignored, and the prisoner and his family suffer hardship

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to file a motion to notify the sentencing judge of the need to decide whether "extraordinary and compelling circumstances" warrant a sentence reduction.

[75] Kendra Waltke, *Family Appeals To Allow Dying Girl To See Father*, LINCOLN JOURNAL STAR, Mar. 21, 2008.

and punishment that no reasonable judge would require, all because the BOP fails to effectuate the reasonable contemplation of the statute, which is to provide sentencing judges with notice any time the relevant facts could fairly be construed as sufficient to trigger an ameliorative sentence reduction.

D. The Federal Boot Camp Program, With Its Sentence Reduction And Extended Community Corrections, Should Be Fully Available As A Sentencing Option For Statutorily Eligible Prisoners.

In 1990, Congress passed a statute authorizing the creation of a boot camp program with incentives available for successful completion.[76] 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.[77] In 1996, through formal rulemaking procedures, the BOP institutionalized incentives that included, for 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.[78] For prisoners with sentences between 30 and 60 months, boot camp eligibility provided extended community corrections, but not the sentence reduction.[79]

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.[80] 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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[76] 18 U.S.C. § 4046 (2000).

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

[78] 28 C.F.R. § 524.30 (1996).

[79] *Id.*

[80] U.S.S.G. § 5F1.7 (2007).

camp for women concluded that the program was effective both in providing skills and lowering recidivism.[81]

In January 2005, the BOP unilaterally terminated the federal boot camp program.[82] 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.[83] 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 the required followup in community corrections; and the change went into effect in a one week budget staff brainstorming session.

The recipients of the Director's memorandum are the same actors who are supposed to provide comment on proposed potential changes in the federal sentencing guidelines under 28 U.S.C. § 994(o) and (p). The boot camp termination went into effect without even the notice and chance to provide comment appropriate under the Administrative Procedure Act. The BOP should reallocate sufficient resources to reopen the federal boot camp program as contemplated by Congress in 18 U.S.C. § 4046, and as utilized by federal judges for over a decade. In the absence of such a change, the Commission should modify the boot camp guideline to suggest creative use of supervised release terms – community service and community placements – to mimic the lower actual custody for nonviolent offenders with minor priors and sentences below 60 months under the terminated program.

Savings

The savings from reinstatement of federal boot camps could be extrapolated from the sentence reductions and increased community corrections while the program existed. The period of community corrections is especially significant because the expense of home

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[81] Bureau of Prisons, OFFICE OF RESEARCH AND EVALUATION, LEWISBURG ICC EVALUATION (1996).

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

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

detention – which is the preferred form of community corrections – amounts to only $3,621.64 per year rather than $24,922.00 for persons in prison.[84]

Litigation Background

In the initial litigation in the District of Massachusetts, Judge Patti B. Sarris held that the unilateral termination of the federal boot camp program violated the APA and the Ex Post Facto Clause of the Constitution.[85] That case was later mooted by placement of the prisoner in a state boot camp program. One prisoner sentenced to the boot camp program succeeded in a § 2255 motion based on an admission that the BOP was aware that the program was terminating at the time sentence was imposed.[86] In place of the 30-month sentence, the judge imposed a year and a day sentence, with conditions of community service and halfway house participation to create a sentence similar to boot camp and its reduced incarceration. Since the termination of the boot camp program, defense counsel have argued, under *Booker* and its progeny, that a sentence to 30 months is greater than necessary, given congressional approval for a sentence reduction in the federal boot camp program.

In one case, the prisoner was placed in the state boot camp program, but not until she had been irreparably harmed by delay in placement. However, the Ninth Circuit held that the unilateral termination of the federal boot camp program violated neither statute nor the Guidelines.[87] Because judges no longer attempt to utilize the sentencing option under U.S.S.G. § 5F1.7, direct litigation regarding boot camp appears to be effectively over.

E. The Sentence Computation Statutes Should Provide Full Credit, Including Good Time, By Avoiding De Facto Consecutive Sentences That Contradict State Court Judgments, By Treating All Of Adjusted Concurrent Sentences Under The Good Time Credit Statute, And By Prohibiting Dead Time Based On Administrative Custody.

The BOP implementation of sentence computation statutes creates three areas of categorical problems that result in over-incarceration.

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[84] Memorandum from Matthew Roland, Deputy Assistant Director, *supra*, note 16.

[85] *Castellini v. Lappin*, 365 F.Supp.2d 197, 205 (D. Mass. 2005).

[86] *United States v. McLean*, No. CR 03-30066-AA, 2005 WL 2371990 (D. Or. Sept. 27, 2005).

[87] *Serrato v. Clark*, 486 F.3d 560, 570 (9th Cir. 2007).

1. De Facto Consecutive Sentences

One of the most common potentials for over-incarceration derives from the statute on concurrent and consecutive sentences. The court only has jurisdiction to impose a sentence consecutively to a sentence that is already in existence.[88] However, under BOP rules, given the vagaries of primary jurisdiction, the BOP can impose de facto consecutive sentences even where the later state sentence explicitly states in the judgment that the sentence is concurrent.[89] The BOP rules are simply inconsistent with the underlying statute, which provides the Executive Branch with no authority to violate the rules of comity by undercutting a state sentence through the manner in which a federal sentence is executed. The BOP should execute the statute to fully credit a later state sentence that is imposed to run concurrently with a previously imposed federal sentence.

Under the plain reading of § 3584(a), the federal court can only impose a consecutive sentence if the defendant "is already subject to an undischarged term of imprisonment," thereby assuring the sentences envisioned by both the state and federal courts. The BOP relies primarily on the last sentence of § 3584(a), which provides that multiple terms of imprisonment run "consecutively unless the court orders that the terms are to be run concurrently." However, the BOP ignores the fact that, for the statute to apply, the sentences must either be imposed at the same time, which could only apply to multiple federal cases, or "if a term of imprisonment is imposed on a defendant *who is already subject to an undischarged term of imprisonment*."[90] Contrary to the plain meaning of the statute and the rules of construction, the BOP construes silence in a federal judgment as an order to have the federal sentence run consecutively to a subsequently imposed state sentence, even though the state judge ordered it to run concurrently to the previously imposed federal sentence.[91]

The BOP's rules are at odds with U.S.S.G. § 5G1.3. Section 5G1.3 is designed to provide guidance for a court considering sentencing options under § 3584(a). In the three subsections of § 5G1.3 and the accompanying commentary, there is no provision for concurrent or consecutive sentencing to an non-existent state sentence. If Congress had

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[88] 18 U.S.C. § 3584 (2000).

[89] Bureau of Prisons Program Statement 5880.28 at 1-32A (Feb. 14, 1997).

[90] 18 U.S.C. § 3584(a) (2000) (emphasis added).

[91] Bureau of Prisons Program Statement 5880.28 at 1-32A ("If the federal sentence is silent, or ordered to run consecutively to the non-existent term of imprisonment, then the federal sentence shall not be placed into operation until the U.S. Marshals' Service or the Bureau of Prisons gains exclusive custody of the prisoner").

intended for § 3584(a) to apply to future sentences, there would be a corresponding guideline. The Sentencing Commission should ensure that the BOP is not creating de facto consecutive sentences that contradict congressional statutes and the Guidelines entrusted to the Commission.

2. Good Time Credits On Adjusted Concurrent Sentences

A problem with the implementation of the good time statute arises when a judge adjusts a sentence pursuant to U.S.S.G. § 5G1.3(b) to achieve a fully or partially concurrent sentence with state time served prior to the imposition of the federal sentence. For example, in order to achieve the fully concurrent sentence called for under the statute and Guidelines, a person charged in both state and federal court with the same gun would need the sentence reduced in federal court for a previously imposed state sentence for the same offense. The courts have held this provision applies even against a mandatory minimum sentence.[92]

When the good time statute is considered in conjunction with the provision for a fully concurrent sentence, the period of time served concurrently should, assuming good behavior by the prisoner, result in the good time credits against that period of incarceration. In violation of the plain meaning of the statutes, the BOP frequently ignores the period of time that was reduced, as indicated in the judgment in accordance with the commentary to § 5G1.3(b), and makes no assessment regarding good time credits. The relevant statutes require that such credit be given.[93]

3. Dead Time For Administrative Immigration Custody

The statute regarding credit for time served provides broad authority for counting time in custody in connection with an offense.[94] However, in immigration cases, with no statutory authorization, the BOP implements the credit statute to treat as dead time the time in the administrative custody of the Immigration and Customs Enforcement.[95] In the past ten years,

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[92] *United States v. Drake*, 49 F.3d 1438, 1440-41 (9th Cir. 1995).

[93] *Kelly v. Daniels*, 469 F.Supp.2d 903, 904 (D. Or. 2007); *see generally* Stephen R. Sady, *Full Good Time Credit For Concurrent Sentences*, The Champion, at 56 (May 2007).

[94] 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 . . . .").

[95] 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

the number of immigration offenses prosecuted in federal court has increased by almost three times.[96] In many of these cases, prisoners are held in immigration custody 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.[97] 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 during the time the federal prosecution is being arranged, the time easily falls within the scope of time in custody in relation to the offense.

Nonetheless, with no articulable reason in the administrative record, the BOP has adopted a rule that categorically denies 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.

Litigation Background and Savings

The issues in this section frequently evade detection or review. The concurrent/consecutive problem is one of the most persistent and complicated in federal sentencing. Even skilled prosecutors and defense lawyers make serious errors by misunderstanding the effect of primary jurisdiction. The Second Circuit ordered a copy of its opinion to Congress because the BOP policies raised serious separation of powers issues if the agency has sole authority whether to recognize a state concurrent sentence.[98] The BOP rules appear to be inconsistent with the statute and in violation of § 706 of the APA.

Service").

[96] *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, Statistical Information Packet Fiscal Year 2006, Table 3, available at www.ussc.gov/JUDPAK/2006/9c06.pdf (17,570 immigration sentences).

[97] 8 C.F.R. § 287.3(d) (requiring ICE to make decision regarding deportation or prosecution within 48 hours of arrest).

[98] *Abdul-Malik v. Hawk-Sawyer*, 403 F.3d 72, 73-74 (2d Cir. 2005); *see also Del Guzzi v. United States*, 980 F.2d 1269, 1272-73 (9th Cir. 1992) (Norris, J. concurring).

As a practical matter, when the error is discovered, the parties frequently attempt to correct the error through an agreed amended judgment under § 2255 or through administrative credit for time in custody nunc pro tunc. Other cases require litigation.[99] These remedies depend on a relatively sophisticated prisoner who has access to counsel: what is needed is a consistent view that the effect of a subsequent state concurrent sentence should always be fully effectuated.

Good time issues on adjusted concurrent sentences frequently go undetected because the prisoner and attorney have not thought through the effect of the good time statute. Concurrent sentences are frequently imposed, and the vagaries of prosecutorial timing make the § 5G1.3 commentary applicable in fairly routine cases. Because adjustments can sometimes amount to years of state custody before the federal charge is brought, individual cases can involve months of good time credits, as in the *Kelly* case.[100]

Aliens are often not in a position to correctly assess how their sentence should be being carried out. The issue can be mooted by an agreement to deduct the administrative time off the front of a sentence, where the plea is to a single count under 8 U.S.C. § 1325 for evading inspection (which has a six month maximum). The legal issue is unusually strong and, with the huge number of aliens being sentenced under the immigration laws, the cumulative effect of the unlawful rules is substantial.

F. The BOP Should Afford Full Community Corrections To Those Eligible For Release Into The Community At The End Of Their Sentences.

Prisoners throughout the country have been in prolonged litigation since 2002 regarding the BOP's reinterpretation of the statute on community correction – 18 U.S.C. § 3624(c). For years, the practice had been for the BOP to implement "front end" sentencing recommendations to place prisoners directly in community corrections.[101] The BOP also considered itself to have discretion to impose more community corrections than the minimum stated in the statute – 10% of the sentence imposed or not more than six months.

This status quo was upset in 2002 when the Department of Justice sent an opinion letter to the BOP that these practices violated the relevant statutes. Litigation has generally been successful in challenging the DOJ position under the statute and later rules. On April

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

[100] *Kelly*, 469 F.Supp.2d at 904.

[101] *Iacaboni v. United States*, 251 F. Supp. 2d 1015, 1017 (D. Mass. 2003).

9, 2008, the President signed the Second Chance Act, which provides the BOP with an opportunity either to substantially increase utilization of community corrections or to start another round of litigation.[102]

The authority of the BOP to house prisoners in the community at any time continues under 18 U.S.C. § 3621(b). However, the Act eliminates the language on which the BOP relied, in error, to limit such placements to the last six months, or 10%, of the sentence, whichever was less, and encourages transfer to the community a year prior to the projected release date. To date however, the BOP has not promulgated rules instructing its personnel on how to implement the Act and prisoners are reporting that no changes are evident in the scheduling of transfers of prisoners to community corrections.

Savings

Full implementation of community corrections could provide huge savings. Halfway houses are modestly less expensive, and home detention only costs a fraction of housing, feeding, and caring for custodial prisoners.[103] Full implementation would save the reduced expense of halfway house for the first half of the year prior to the projected release date. The last six months, under the BOP's preference for transfer to home detention,[104] should normally be in home detention at a small fraction of prison costs.

Litigation Background

In response to the DOJ's letter, prisoners throughout the country litigated and won challenges to limitations on halfway house placements on the theory that the DOJ's statutory interpretation was simply wrong.[105] In response, the BOP promulgated new rules adhering to the DOJ's legal position as a matter of discretion, rather than as a matter of law. Once again challenges throughout the country mostly resulted in a finding that the rule violated the

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[102] Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (2008).

[103] Incarceration costs $2,076.83 per month compared to $1,905.92 for halfway house placement and $301.80 for home confinement. Memorandum from Matthew Roland, Deputy Assistant Director, *supra* at note 16.

[104] Bureau of Prisons Program Statement 7320.01 at 3 (Sept. 6, 1995) ("The Community Corrections Manager (CCM) shall ensure that each appropriate inmate is placed on home confinement as soon as otherwise eligible.").

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

statute.[106] However, the practical effect of the litigation has been limited by the difficulty of establishing that a claim that the identical decision on community corrections did not result in a good faith exercise of discretion, rather than adamant adherence to the incorrect statement of the law.

The failure to fully implement the Second Chance Act's authorization of greater use of community corrections is likely to generate litigation by prisoners who realize that they are being irreparably harmed by delayed implementation, or grudging implementation, of the Act. The BOP should also adjust the community corrections component of RDAP for a proportionate increase in community corrections. Most importantly, the Act should be implemented in a manner that maximizes the time of rehabilitative programming in the prisoner's home community.

Conclusion

Basic separation of powers doctrine limits the appropriate role of the Executive Branch in determining the actual length of custody. Where Congress provides ameliorative measures that lessen the period of custody, such programs should be executed in a manner that assures that terms of imprisonment are subject to the full lenity authorized by Congress. By misreading or grudgingly implementing ameliorative statutes, the Executive Branch can seriously exacerbate actual time served. Such Executive practices, because not connected to the SRA's purposes of sentencing, have become the engine for massive over-incarceration. Given the agency's natural bureaucratic inclination toward growth, the Executive Branch, by failing to fully execute ameliorative laws, unilaterally and unfairly lengthens prisoners' sentences.

At the outset of the Guidelines era, the Supreme Court held that the Sentencing Commission had sufficient judicial participation and congressional oversight to survive a separation of powers challenge. The Executive Branch's chronic failure to fully implement Congress's ameliorative measures has distorted the SRA, adding to the soaring incarceration numbers and expense of unnecessarily inflated prison populations. The Commission should make a priority of working with the BOP to fully implement ameliorative measures that would greatly reduce actual incarceration and its attendant costs. Unless such steps are taken quickly, the Commission should promulgate policy statements to direct judges to consider

[106] *Wedelstedt v. Wiley*, 477 F.3d 1160 (10th Cir. 2007); *Levine v. Apker*, 455 F.3d 71 (2d Cir. 2006); *Fults v. Sanders*, 442 F.3d 1088 (8th Cir. 2006); *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235 (3d Cir. 2005). *But see Miller v. Whitehead*, 2008 WL 2220430 (8th Cir. May 30, 2008); *Muniz v. Sabol*, 517 F.3d 29, 32 (1st Cir. 2008).

over-incarceration due to the manner in which sentences are executed – the "kinds" of sentences available – as grounds for imposition of sentence below the sentencing range.