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UPDATE ON BOP ISSUES AFFECTING CLIENTS BEFORE AND AFTER SENTENCING

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February 2007

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While our clients continue to face longer sentences, the BOP continues to err on the side of over-incarceration in administering sentences. Harsh BOP practices require diligent advocacy on our part to protect the rights of clients, both before sentencing and after the prison door shuts, to keep our clients from serving more time than necessary.

A. Halfway House Litigation – Direct Commitment And The 10% Rule

Prisoners have recently won major cases involving the BOP's halfway house policies. *Levine v. Apker,* 455 F.3d 71 (2nd Cir. 2006); *Fultz v. Sanders*, 442 F.3d 1088 (8th Cir. 2006); *Woodall v. Federal Bureau of Prisons*, 432 F.3d 235 (3rd Cir. 2005). In these cases, courts resoundingly rejected BOP rules that, in the exercise of BOP discretion, prohibit prisoners from being placed in community corrections except within the last 10% of the term of imprisonment. The three appeals courts that have ruled on the issue read the agency's discretion to be limited by the statutory command to make individualized placement determinations based on enumerated factors.

As a result of these cases, the BOP has apparently revised its prohibition of direct commitments in the Third Circuit, and may do so for the Second and Eighth Circuits as well. With more successful challenges, the BOP may abandon the policy altogether. Under these decisions the BOP is required not only to consider longer CCC placements at the end of sentences, but also to give good faith consideration to designating a halfway house in appropriate cases for service of the entire sentence. Defense counsel should note that post-*Booker*, substantially the same result can be obtained by means of a sentence to probation with a CCC condition, or to time served (as little as a day) with CCC as a condition of supervised release. Attached is an excellent article co-authored by Todd Bussert, Peter Goldberger, and Mary Price, tracing the history of the litigation that can and should be pursued in other districts and circuits.

B. The Good Time Credits – 54 Or 47 Days Per Year?

How do Defenders respond to Justice Stevens? In a statement accompanying a denial of certiorari on the good time issue, Justice Stevens said we appear to be right that the statute calls for 54 days credit for every year of the sentence imposed: "[B]oth the text 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." Then, instead of granting certiorari, he encourages further litigation in the absence of a circuit split: "[T]he question has sufficient importance to merit further study, not only by judges but by other Government officials as well." *Moreland v. Federal Bureau of Prisons*, 126 S.Ct. 1906 (2006) (Stevens, J., statement respecting the denial of certiorari).

The circuits are in disarray on reasoning but virtually uniform in result: the good time statute is ambiguous, so instead of applying the rule of lenity, the courts have deferred to the BOP's severe construction. Three district courts have ruled our way in well-reasoned opinions that have been overturned by circuit courts. *Moreland v. Fed. Bureau of Prisons*, 363 F. Supp. 2d 883 (S. D. Tex. 2005); *Williams v. DeWalt*, 351 F. Supp. 2d 412 (D. Md. 2004); *White v. Scibana*, 314 F. Supp. 2d 834 (W.D. Wisc. 2004).

The story starts in 1987, when the Sentencing Commission's staff was assigned the task of creating a baseline for the Sentencing Table, upon which all federal sentences were to be graphed. To create the Sentencing Table, Sentencing Commission staff collected a large sample of sentences for a broad array of crimes and determined the actual time served as a baseline. United States Sentencing Commission, *Supplemental Report On The Initial Sentencing Guidelines And Policy Statements* (June 18, 1987) at 23. Then, the Commission "adjusted for good time" by figuring out the longer sentence for which the actual time served would be 85%:

> Prison time was increased by dividing by 0.85 good time when the term exceeded twelve 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).

Id.; *see also* U.S.S.G. Ch.1, Pt. A, § 3, para. 3 (2005) at 9 ("Honesty 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.").

Thus, every federal prisoner's term of imprisonment is based on a Sentencing Table that assumes good time credit at 15% of the sentence imposed. But the BOP takes a different view. The BOP does not base good time on the term of imprisonment, but substitutes a "time served" formula that reduces maximum good time credit by seven days for every year of the sentence imposed. The BOP formula requires that ideal prisoners serve at least 87.2% of the sentence imposed. For example, on a year-and-a-day sentence, maximum good time credit is 47 days, not 54 days; on a 60-month sentence, the maximum good time credit is 235 days, instead of 270 days; on a 120-month sentence, the maximum good time credit 470 days, not 540 days. Until the BOP changes its method of calculation to mirror the method upon which the Sentencing Table is calibrated, every bottom-of-the-guideline sentence is 2.2% higher than the Sentencing Commission intended based on its statistical methodology.

The over-incarceration multiplies with every added year of the sentence. For all federal prisoners eligible for good time, the total time involved is over 34,000 years (188,410 prisoners x 7 days a year x 9.5 average sentence over a year and less than life, 365 days in

a year = 34,326 years). At $22,265.00 per year for non-capital incarceration expenditures, this amounts to over $764 million in taxpayer money that Congress did not intend or authorize to expend on incarceration for current prisoners, and over $66 million more for each new year. Our most recent APA challenge to the BOP's miscalculation is outlined in the attached *Tablada* materials.

C. Eligibility For The One-Year Sentence Reduction For Successful Completion Of Residential Substance Abuse Treatment Under 18 U.S.C. § 3621(e)

In 1990, Congress mandated appropriate substance abuse treatment "for each prisoner the BOP determines has a treatable condition of substance addiction or abuse," including prison residential treatment lasting between six and twelve months. 18 U.S.C. § 3621(b) and (e). In 1994, Congress, recognizing prisoners' general unwillingness to volunteer for such treatment, created an incentive to encourage federal prisoners to participate in the residential drug and alcohol program (DAP). The statutory amendment authorized reduction of incarceration for prisoners "convicted of a nonviolent offense" who successfully completed the program. 18 U.S.C. § 3621(e)(2)(B).

The BOP proceeded to promulgate various rules limiting the availability of this sentence reduction, which has generated hundreds of federal cases. The first set of rules disqualified prisoners with simple gun possession (either drug conviction with gun bumps or convictions for felon in possession under Section 922(g)). The prisoners prevailed in the majority of jurisdictions. *Lopez v. Davis*, 531 U.S. 230, 234-35 (2001) (citing cases). In response, in October 1997, the BOP promulgated a new regulation and program statement disqualifying the same prisoners on a different ground – as an exercise of BOP administrative discretion. Although the Supreme Court upheld the substance of the new rules, the *Lopez* court did not reach the question whether the 1997 rules were promulgated in violation of the Administrative Procedure Act. On December 20, 2000, the rules approved in *Lopez* became permanent.

Even though *Lopez* essentially closed the door on DAP statutory challenges based on gun possession, we finally won on the Administrative Procedure Act issue left open in footnote 6 of *Lopez*. In *Paulsen v. Daniels*, 413 F.3d 999 (9th Cir. 2005), the Ninth Circuit held invalid the 1997 regulation and program statement as applied to prisoners whose eligibility was decided before the final rule issued in December 2000. Since the only valid rules in effect prior to October 1997 were those promulgated following *Davis v. Crabtree*,109 F.3d 566 (9th Cir. 1997), and *Downey v. Crabtree*, 100 F.3d 662 (9th Cir. 1996), the prisoners were eligible for the sentence reduction. The district court has granted relief under *Paulsen* to a prisoner who asked to apply to DAP before December 2000, but was erroneously told that it was too early to apply to the program. *Wade v. Daniels*, 373 F. Supp. 2d 1201 (D. Or. 2005).

These same arguments should prevail for gun possessors disqualified under the 1997 rule who would have been eligible under the earlier Circuit split – basically all Circuits except the Fourth and Fifth. Prisoners who are released to supervision before relief is granted can apply for early termination of supervised release under18 U.S.C. § 3583(e). *Gunderson v. Hood,* 268 F.3d 1142, 1152 (9th Cir. 2001). As demonstrated by the CCC litigation, noncompliance with the APA in promulgating BOP rules can be a fruitful area of litigation.

Oregon prisoners have brought a fourth challenge to the categorical disqualification based on gun possession: whether the BOP failed to articulate proper justifications for the rule change, rendering the final rules invalid because they are arbitrary and capricious under the APA under *Motor Vehicles Mfrs. Ass'n of U.S. v. State Farm*, 463 U.S. 29, 43 (1983). A review of the regulatory history demonstrated that the BOP offered no reasoned rationale for disqualifying prisoners based on factors considered non-violent in most every other context. The district court rejected the argument, relying on *Lopez*. *Arrington v. Daniels,* 2006 WL 2092555 (D.Or. July 26, 2006). We hope that the Ninth Circuit will reject the "because we can" reasoning, and hold that the BOP rules are invalid in substance as well. If you would like the briefing on appeal in *Arrington v. Daniels*, please contact Lynn Deffebach at lynn_deffebach@fd.org.

In addition to the APA issue, we have had success in litigating other DAP challenges: where rules are applied retroactively to the prisoners' disadvantage *(Bowen v. Hood*, 202 F.3d 1211, 1220-22 (9th Cir. 2002); *Cort v. Crabtree*, 113 F.3d 1081 (9th Cir. 1997)); where the BOP revokes a prisoner's eligibility after a mistake regarding eligibility was discovered (*Harris v. Daniels,* ___ F. Supp. 2d ___, 2006 WL 3770976 (D.Or. Dec. 5, 2006)); where the BOP fails to follow its own rules (*Richardson v. Joslin*, 397 F. Supp. 2d 830, 833 (N.D. Tex. 2005); *Kuna v. Daniels,* 234 F. Supp. 2d 1168 (D.Or. 2002)); where the presentence report does not establish disqualifying facts, such as gun factors (*Hicks v. Hood,* 203 F. Supp. 2d 379 (D.Or. 2002); *Richardson*, 397 F. Supp. 2d at 834); and where a prior state assault conviction used to disqualify DAP-ers does not meet the BOP's own definition for aggravated assault (*Byrd v. Crabtree,* 22 F. Supp. 2d 1128 (D.Or. 1998)). We have had success in challenging unwritten BOP rules on DAP as arbitrary and capricious. *Barq v. Daniels*, 428 F. Supp. 2d 1147(D.Or. 2006); *Richardson*, 397 F. Supp. 2d at 833-35. The district court has been willing to enforce BOP rules calling for early determinations of a prisoner's eligibility. *Engel v. Daniels*, __ F. Supp. 2d __, 2006 WL 3146441 (D.Or. Oct. 27, 2006); *Wade v. Daniels*, 373 F. Supp. 2d 1201, 1202 (D.Or.2005).

D. Credit For Time Served While Section 1326 Defendants Are In Administrative Immigration Custody

An area where many clients lose small amounts of time is the BOP policy that excludes administrative immigration custody under the jail time statute, 18 U.S.C. § 3585(b).

Across the country, the number of prosecutions for illegal reentry has skyrocketed. Depending on the manner in which these cases are brought into court, prisoners can lose days, weeks, or months, for which they receive no credit. BOP Program Statement 5880.28 (Feb. 14, 1997) ("An inmate being held by INS pending a civil deportation determination is not being held in 'official detention' pending criminal charges."). For example, immigration agents will sometimes take someone into custody while it "decides" whether to deport or prosecute. The dead-time problem results from the BOP's theory that any time spent in immigration custody prior to formal prosecution is exclusively related to civil deportation.

Our clients need to be carefully educated about how much time we believe they should be receiving credit for so they can notify us if the BOP is treating any detention as dead time. The BOP, after commencement or threat of litigation, may provide credit based on the theory that immigration detainees with prior convictions are being held to determine whether to prosecute, rather than solely for civil detention purposes, especially given the general rule that the initial deportation decision should be made within 48 hours. We have also negotiated with the government to reduce sentences up front to compensate for administrative custody. Some courts have granted departures to include the time in custody.

Another BOP policy that has significant impact on our 1326 clients is the failure of the BOP to aggregate certain consecutive (1325 six- and 24-month) sentences, resulting in significant loss of good time. The problem arises when the offense dates straddle April 26, 1996, the date the PLRA was enacted, which made minor changes in the good time scheme. These changes, according to the BOP, make it impossible for the sentences to be combined and treated as one. BOP Program Statement 5880.28 at 1-31 (Feb. 21, 1997). Because the six-month sentence is less than a year, the BOP treats it as a sentence to less than one year (which disqualifies it for good time under 18 U.S.C. § 3624(b)). This rule is flatly contrary to statute: "Multiple terms of imprisonment ordered to run consecutively or concurrently shall be treated for administrative purposes as a single aggregate term of imprisonment." 18 U.S.C. § 3584(c). This problem is sometimes negotiated by making the offense dates on the indictments and judgments post-April 1996. If litigation is needed, this issue should be a winner based on the abundant authority that statutes trump prison rules.

E. Boot Camp Termination

On January 14, 2005, the BOP unilaterally announced the termination of the federal boot camp program, which is one of only two programs that provides for a sentence reduction and extended participation in community corrections. A defendant sentenced to 30 months, with a federal boot camp recommendation, would spend only six months of actual prison time. The statute establishing the program and the Guideline implementing it as a sentencing option were never amended: the BOP presented the decision as a done deal with no input from judges, prosecutors, or defense counsel, claiming studies and deliberation made the termination necessary to save costs.

The BOP was less than candid. The studies do not support their claims, and the only study on federal programs – from 1996 – supported the federal program. And the claims of deliberation are a joke: the BOP higher-ups have testified that the decision was made during a one-week brainstorming session. The BOP testified against the statute creating the program, then used a stealth claim of savings to kill the program.

The initial judicial reaction declared the termination a violation of the notice-and-comment provisions of the Administrative Procedure Act and the Ex Post Facto Clause. *Castellini v. Lappin*, 365 F. Supp. 2d 197 (D. Mass. 2005). But the BOP engaged in a concerted policy of mooting cases, including *Castellini*, by sending prisoners who filed to state boot camps. Later district courts, based on defective analyses, found the Judiciary helpless in the face of agency action rendering this Guidelines "Sentencing Option" a nullity.

There are several approaches to boot camp issues. First, for those defendants sentenced after the BOP's November 2005 decision to terminate, § 2255 relief is available because the sentence was based on a material false premise. *United States v. McLean*, 2005 WL 2371990, at *4-5 (D. Or. Sept. 27, 2005). For those being resentenced and those otherwise eligible for the program, we should be arguing for sentencing below the guidelines to achieve an equivalent boot camp sentence. For example, a defendant with a 30-month bottom of the guideline sentence should be requesting a six month prison sentence, followed by six months in a halfway house as a condition of supervised release, followed by six months of home detention to reach a sentence equivalent to what the Sentencing Commission, in promulgating U.S.S.G. § 5F1.7, approved for individuals in the 30 months or less range as sufficient to satisfy the needs of sentencing.

For prisoners who have a boot camp recommendation and who are serving a sentence greater than 30 but less than 60 months, the filing of a § 2241 petition may have benefits beyond the righteousness of our legal position. The BOP may be able to contract with a state boot camp to allow your client the year of community corrections, six months of which would be lost without boot camp.

The legal challenge is presently before the Ninth Circuit. *Serrato v. Clark*, CA 06-15167. The opening brief, which is available from the Portland office, structures the argument on the unlawfulness of the BOP's action. The layering of constitutional, statutory, and administrative arguments provide a template for other challenges to BOP actions.

F. Constitutional Violations In Prison Disciplinary Proceedings

Where good time or other concrete collateral consequences are at issue, the district court has jurisdiction to review disciplinary proceedings in which there is an allegation that the prisoner's statutory or constitutional rights were violated. For example, the district court found that a sanction for abuse of telephone privileges violated the due process rights of the prisoner because he had inadequate notice regarding the prohibition. *Seehausen v. Van Buren*, 243 F. Supp. 2d 1, 165 (D. Or. 2002).

More recently, we have been litigating the unconstitutional practice of imposing sanctions and transferring prisoners back to institutions following alleged halfway house violations. In one case, the halfway house disciplinary hearing concluded that the prisoner had committed no violation and recommended expunction of the incident report. Despite this finding, the prisoner, without notice or hearing, was sanctioned by a Disciplinary Hearings Officer with transfer back to the institution and loss of his DAP early release based on additional evidence gathered by the DHO. The court granted our preliminary injunction. Prison disciplinary actions, perhaps because they are so seldom reviewed, are often fraught with due process problems that need a lawyer's skill to identify and to articulate the bases for successful court challenges.

G. The Bureau Of Prison's Tendency To Ignore State Concurrent Sentences And Administratively Convert Them Into *De Facto* Consecutive Sentences

When more than one jurisdiction sentences your client, recurring legal issues and factual traps arise that can frustrate intentions that federal and state sentences be served concurrently. Because the law in this area is not always favorable to prisoners, the best solutions are prevention or, secondarily, negotiation. Prevention means careful research and understanding regarding who has primary jurisdiction over the sentenced person, what the priorities are on detainers, and how the sentencing law applies. When state and federal concurrent and consecutive issues become fouled up, depending on the players, the best option is to reform the agreement through an amended judgment or resentencing with the agreement of the parties. If the case goes to litigation, there is still hope for a decent resolution.

The BOP presumes that all sentences are consecutive unless expressly stated in the federal judgment, despite subsequently imposed state sentences that are expressly concurrent to the federal sentence. The general rule is that, regardless of the order in which sentences are imposed, the sentence of the sovereign having primary jurisdiction will be the sentence that is served first. Primary jurisdiction is generally acquired either by arresting the defendant first or by having another jurisdiction release its hold on the defendant.

Confusion often arises as to who has primary jurisdiction, especially where the defendant is arrested by the state and housed in the county jail where federal defendants are also held. A prisoner appearing in federal court pursuant to a writ of habeas corpus *ad prosequendum* is not in primary federal custody. Borrowed prisoners must be returned; the lender retains its priority. Too often, prisoners have completely discharged what they expected to be a fully concurrent state sentence only to discover when they arrive in federal prison that the BOP will not credit their federal sentence with time spent in state custody.

Multiple jurisdiction sentencing problems sometimes leave the courts helpless to correct obvious injustices. Listen to the frustration of the concurring judge in a Ninth Circuit case denying relief:

> . . . I see this as one of those deeply troubling cases in which the law dictates an unjust result. It is undisputed that Del Guzzi was sentenced to five years in federal prison and seven years in state prison and that these terms were to run concurrently. It is similarly undisputed that because he was not immediately transported to federal prison, as the state sentence judge recommended, he served his entire sentence in state prison before reaching federal prison, where he was then informed he would have to serve his entire federal sentence with no credit given for the state time. Accordingly, Del Guzzi will spend approximately eight years and seven months in prison, although neither the federal nor the state sentencing court anticipated that he would spend more than five years in prison. In essence, the refusal of the federal officials to accept custody of Del Guzzi turned his concurrent sentences into consecutive ones.

Del Guzzi v. United States, 980 F.2d 1269, 1271 (9th Cir. 1992) (Norris, J., concurring) (emphasis in original; footnote omitted). In concluding his opinion, Judge Norris stated, "I hope that defense attorneys and state judges will from this point forward structure their plea agreements and sentencing orders in a manner in which avoids the unintended and unjust result reached today." *Del Guzzi*, 980 F.2d at 1273. Lawyers and prisoners alike can attest to the futility of this hope.

More recently, Second Circuit Judge Dennis Jacobs reluctantly affirmed the dismissal of a *pro se* petition, but ordered that a copy of the opinion be forwarded to the Members of the Judiciary Committees of both houses because the BOP policy raises serious separation of powers questions when it has the sole authority of whether to recognize a state concurrent sentence. *Abdul-Malik v. Hawk-Sawyer,* 403 F.3d 72 (2nd Cir. 2005).

Once competing judgments are final, and after the time for collateral state proceedings has passed, it is difficult, but not impossible, to repair concurrent/consecutive problems through litigation. In *Cozine v. Crabtree*, 15 F. Supp. 2d 997 (D.Or. 1998), the court held

that the BOP was required to credit a federal sentence with custodial time served by a prisoner in a state facility under a state sentence imposed after and expressly concurrent with the federal sentence, and where the state tendered the prisoner to the BOP, which refused to accept custody. First, the court rejected the Bureau of Prisons' argument that, because the federal sentence was not explicitly concurrent to the subsequently imposed state sentence, the federal sentence was consecutive by operation of 18 U.S.C. § 3584(a). The court pointed out that, because the state sentence had not yet been imposed, there was no sentence to which the federal sentence could run concurrently. *Cozine*, 15 F. Supp. 2d at 1006-07. Second, *Cozine* held that the doctrine of comity required the Bureau of Prisons to effectuate the sentence the state imposed, even if to do so meant that the prisoner received "double credit." 15 F. Supp. 2d at 101 1. *But see Taylor v. Sawyer*, 284 F.3d 1 143 (9th Cir. 2002). Finally, the court held that, because Mr. Cozine was in the federal government's primary jurisdiction when the federal sentence was imposed, the state institution should be designated *nunc pro tunc* for service of the federal sentence. 15 F. Supp. 2d at 1018.

In *Buggs v. Crabtree*, 32 F. Supp. 2d 1215 (D.Or. 1998), the district court also gave effect to a state concurrent sentence, notwithstanding contrary BOP rules. The issue in *Buggs* turned on who had primary jurisdiction. There, the state prosecutor, defense counsel, and the judge all believed Mr. Buggs was serving his federal sentence when the state court sentenced him, ordering the sentence to run concurrently to the federal sentence "presently being served." However, the BOP did not take custody of Mr. Buggs until after he had completed the state sentence, then refused to credit him with any prior custody time. The *Buggs* court held that, by the state's failure to act for over six months on the state charges, the state relinquished its primary jurisdiction to the federal government. 32 F. Supp. 2d at 1219. Thus, Mr. Buggs was in the federal government's primary jurisdiction when he was sentenced. As such, his sentence began to run upon sentencing, and he was entitled to credit for time spent in the state jail. 32 F. Supp. 2d at 1232. The court also found that comity and full faith and credit required the Bureau of Prisons to credit with all prior custody even if that time was credited toward another sentence. *Id.*

Another issue regarding concurrent time arises under the section of the jail credit statute, 18 U.S.C. § 3585(b), that provides for credit for any time spent in official detention "that has not been credited against another sentence." Although generally barring credit previously provided against state sentences, there is an exception where a federal detainer prevented release on bail of the prisoner while in state custody. *Shaw v. Smith*, 680 F.2d 1104, 1106 (5th Cir. 1982). However, under the statutes, credit is generally not awarded from the start of the state sentence to the start of the federal sentence, nor does the federal sentence commence any earlier than imposition. Again, the best solutions involve prevention, such as structuring the federal sentence to be reduced by the time in state custody before the federal sentence starts under U.S.S.G. § 5Gl.3.

H. Good Time Credit On A §5G1.3 Adjusted Sentence

Prisoners may be able to off-set the BOP's harsh treatment of concurrent state and federal sentences with the award of good time credits for the time spent in state custody prior to federal sentencing. The BOP apparently only awards good time credit on the post-adjusted §5G1.3 concurrent sentence, incorrectly believing that the adjusted sentence is the term of imprisonment with the consequence that clients are losing a considerable amount of good time credit for the time they spend in state custody prior to sentencing.

In *Kelly v. Daniels,* ___ F. Supp. 2d ___, 2007 WL 79342 (D.Or. Jan. 12, 2006), the Court rejected the BOP's position and held that prisoners are entitled to good time credit for the time spent in state custody on a U.S.S.G. §5G1.3 adjusted sentence to achieve a fully concurrent sentence. George Kelly had his sentence adjusted down 28 months, but the Bureau of Prisons refused to exercise its statutory duty to award good time credits on the whole sentence, instead treating the sentence as a downward departure, despite language in the Guidelines Manual and the Judgment contradicted this characterization.

Under U.S.S.G. § 5G1.3, the sentencing judge can adjust a sentence down to achieve a partially or fully concurrent sentence to a previously imposed state sentence. In the commentary, sentencing judges have been instructed to note in the judgment that the lower number of months in the sentence is not a departure but an adjustment to reflect that the Bureau of Prisons, pursuant to 18 U.S.C. § 3585, will not credit time prior to the commencement of the sentence that has been credited against another sentence. The concurrent portion of the sentence, under the separate good time credit statute, is fully subject to good time credits for the time in state custody. 18 U.S.C. § 3624(b).

We need to check good time calculation because the Bureau of Prisons does not always award good time for the portion of the total term of imprisonment served concurrently while in state custody, treating the adjusted sentence as a departure rather than as part of the term of imprisonment. After exhausting administrative remedies (assuming no imminent harm), we should litigate this issue by establishing that no departure is involved, that the plain meaning of the good time credit statute requires that earned good time credit be awarded on the entire term of imprisonment, and that any ambiguity in the statute should be resolved in favor of the prisoner.

The good time credits for Mr. Kelly's 28 months come out to about four fewer months of actual incarceration. We need to be sure our clients are receiving the proper calculation of good time credit on § 5G1.3 sentences, which can save them clients many months of prison time and accelerate their entry to community corrections programming.

I. Complaints About The Inadequacy of Medical Care, Particularly Follow-up Medical Care, Are Increasing, And The Courts Are Beginning To Respond

We have been receiving a greater number of complaints from clients who are not receiving adequate medical care, due in part to prison over-population and the failure to increase medical staff accordingly. The primary complaint is not that clients are not seen by the medical unit, but rather that they are not receiving the recommended course of care.

In a district court opinion, Massachusetts District Court Judge Nancy Gertner demonstrated that an ounce of prevention is worth a pound of cure. In *United States Pineyro,* 372 F. Supp. 2d 133 (D. Mass. 2005), the defendant, after fifteen month of pretrial detention, faced a 46-57 month guideline range for being a felon in possession of a firearm. Mr. Pineyro suffered from a complex and rare medical condition – heterotopic ossification – a disease causing excessive and painful bone growth.

Defense counsel moved for a downward departure under U.S.S.G. § 5H1.4, putting on detailed evidence regarding the physical infirmity and the suffering caused by lack of adequate treatment in pretrial detention. The critical piece of the analysis was that – as it so often does – the BOP gave bland assurances that the BOP "can provide the necessary and appropriate treatment for Mr. Pineyro." Interestingly, the BOP opinion came after a BOP medical study ordered by the court under 18 U.S.C. § 3552(b), over defense objection. Nevertheless, the court imposed a time served sentence.

Judge Gertner analyzed her sentence both under the guidelines and under the § 3553(a) post-*Booker* advisory guidelines. On the medical issue, the court rejected the blithe assurances so often heard regarding our medically vulnerable clients, stating:

> The BOP has not remotely met its burden of showing that it can provide the defendant with 'needed...medical care, or other correctional treatment in the most effective manner.' 18 U.S.C. § 3553(a)(2)(D)(italics supplied). It offered no treatment plan comparable to what Pineyro is presently receiving. Its conclusion that it can provide the "necessary and appropriate treatment" is not only vague, it does not meet the statutory requirements (that Pineyro receive 'the most effective' treatment).

Pineyro, 372 F. Supp. 2d at 138.

In *Jett v. Penner*, 439 F.3d 1091 (9th Cir. 2006), the Ninth Circuit opened a window for demanding that prisoners receive follow-up care after they are in BOP custody. In that §1983 case, the Ninth Circuit reversed a summary judgment motion finding that the deliberate indifference be manifest in the manner in which prison physicians provided care. There, the prisoner suffered a broken thumb, was taken to the local hospital for treatment, but the prison physicians did not follow the emergency doctor's recommendation that he

receive further care. *Jett* can be used to gain administrative relief for clients short of litigation.

Many of us, and most of our clients, are aware that the BOP requires prisoners to contribute 25% of their earnings and have their own health insurance while in halfway houses. What few know is that the BOP disqualifies prisoners with disabilities from halfway house placement because they cannot work and therefore, cannot contribute 25% or because they do not have insurance (if not VA eligible). The CCC disqualification – even if based on a disability – makes prisoners ineligible for the DAP sentence reduction. This policy is wrong on so many levels, not the least of which is the Americans with Disabilities Act. When litigation looks likely, the BOP has changed its position and agreed to the transfer. We have some draft pleadings if you are confronted with this situation that we would be happy to share.

There are two new policies regarding medical care. First, each institution is now ranked according to one of four levels of medical care, and designation decisions are being made after classifying clients from the medical information in the presentence report. Second, the BOP is now charging $5 inmates for sick-call visits. The rules provide that truly indigent prisoners will not be denied emergency care.

J. Sex-Offender Notification Requirement

In *Simmons v. Nash*, 361 F. Supp. 2d 452 (D.N.J. 2005), a New Jersey district court judge entered declaratory and injunctive relief against the BOP's interpretation of the sex offender notification statute. Under 18 U.S.C. § 4042(c), the BOP provides notice and requires registration for prisoners "convicted of any of the following offenses," listing federal sex crimes and "any other offenses designated by the Attorney General as a sexual offense." The BOP, by means of a regulation and program statement, expanded the statutory language beyond the offense of conviction to include any prior state convictions for sex offenses. Immanuel Simmons, litigating pro se, insisted that his 1983 prior state court conviction could not trigger the federal notice and registration requirements.

The district court agreed. The court held that the statute unambiguously limited its application to the offense of conviction. The court relied heavily on the Fifth Circuit's ruling in *Henrikson v. Guzik*, 249 F.3d 395 (5th Cir. 2001), which construed the adjacent provisions of § 4042(b) as applying only to the offense of conviction for crimes of violence and drug trafficking. In the absence of legislative authorization, the BOP lacked the power to expand the scope of sex offender notice and registration, by regulation and program statement, beyond the offense of conviction.

A district court in Massachusetts followed *Simmons*, also finding that the notification statutes only applied to current offenses. *Fox v. Lappin*, 409 F. Supp. 2d 79 (D. Mass. 2006).

Unfortunately, *Fox* did not extend the reasoning to the application of a public safety factor, which precludes CCC placement. Instead, the court held that classification as a sex offender based on a prior conviction was not an abuse of the BOP's discretion to make placement decisions. *Fox*, 409 F. Supp. 2d at 89-92.

The classification as sex offenders for those convicted of possession of child pornography, with no contact with children, is worrisome, especially in light of new studies indicating a lower rate of recidivism. Also worrisome is the impact of the Adam Walsh Act on prisoners convicted of sex offenses. The BOP has begun to implement the Adam Walsh Act, although the BOP has not yet published any rules. The attached e-mail from David Beneman explains some of the changes. As David urges, it is imperative that you advise your clients that anything that they say regarding past sexual impropriety can be used to certify them as a "sexually dangerous person" and lead to civil commitment. *See United States v. Antelope*, 395 F.3d 1128 (9th Cir. 2005). It also appears that the BOP is applying these rules retroactively to deny clients half-way house placements which for those who are eligible for the DAP sentence reduction means they spend an extra year in prison.

K. Challenging BOP Misadministration Of The Sentence Through A Petition For Writ Of Habeas Corpus Under 28 U.S.C. § 2241, Usually After Exhaustion Of Administrative Remedies

Prison litigation usually occurs in the district where the prisoner is being held, with the respondent being the warden. 28 U.S.C. § 2241. A first critical step is appointment of counsel; *pro se* litigation is only rarely successful. Your client's chances of success increase dramatically if you are able to represent or secure representation for him or her. Depending on your district culture, representation can be considered part of the original representation or result from an order from the court either before or after the Section 2241 petition has been submitted. Your jurisdiction may either have forms for Section 2241 petitions or you can simply follow an easy model from our office. If your district uniformly refuses to appoint in Section 2241 cases, despite the Criminal Justice Act's specific authorization in 18 U.S.C. § 3006A(a)(2)(B), consider whether, through negotiation or litigation, you can change that practice since "the existence of discretion requires its exercise." *See United States v. Miller*, 722 F.2d 562, 565 (9th Cir. 1983).

The requirement that administrative remedies must be exhausted raises several tactical and legal issues. First, exhaustion is not a jurisdictional requirement under Section 2241, but a waivable judicial requirement. *McCarthy v. Madigan,* 503 U.S. 140, 144 (1992); *Brown v. Rison* 895 F.2d 533, 535 (9th Cir. 1990); *United States v. Woods,* 888 F.2d 653, 654 (9th Cir. 1989). The Bureau of Prisons often argues incorrectly that the Prison Litigation Reform Act's strict and inflexible exhaustion requirement applies to Section 2241 – it does not. *Casanova v. Dubois*, 304 F.3d 75, 78 n.3 (1st Cir. 2002) (citing cases); *Skinner v. Wiley,* 355

F.3d 1293 (11th Cir. 2004); *Grier v. Hood,* 46 Fed.Appx. 433, 440 (9th Cir. 2002); *on remand, Bohner v. Daniels,* 243 F. Supp. 2d 1171 (D. Or. 2003). Where there is no immediate prejudice to the prisoner, we generally recommend that prisoners exhaust their administrative remedies up to the national office before filing a Section 2241 petition for two reasons: 1) by some chance, the client might prevail;[1] and 2) the BOP will be deprived of a procedural argument to obfuscate your issue. In the situation where your client is facing irreparable harm and futility, we have sample briefing on waiver of exhaustion of administrative remedies.

There are other vehicles available for challenging the BOP's policies. The former general rule that habeas is only available to challenge the length of confinement, while challenges to conditions of confinement cases must be brought through civil actions, is not inflexible. Last Term, the Supreme Court held that state prisoners challenging parole board procedures that, if successful, would inevitably result in a shorter sentence, could seek § 1983 or equitable relief. *Wilkerson v. Dotson,* 544 U.S. 74 (2005); *see also Docken v. Chase*, 393 F.3d 1024, 1030 (9th Cir. 2004).

Courts are also empowered to grant injunctive and declaratory relief under the APA, the Mandamus Act, and the Declaratory Judgment Act. Under the APA, the court may enter a judgment or device against the United States provided that "any mandatory or injunctive decree shall specify the Federal officer . . . personally responsible for compliance." 5 U.S.C. § 702. Under Section 706, the court may order the BOP to fulfill its statutory duty to administer a program, or enjoin it from acting beyond its statutory authority, or if its actions are arbitrary and capricious. *Castellini*, 365 F. Supp. 2d at 206 (finding court intervention appropriate). Similarly, the Declaratory Judgment Act provides broad authority to fashion an appropriate remedy: "Further necessary or proper relief based on a declaratory judgment or decree may be granted." 28 U.S.C. § 2202; *see also Colton v. Ashcroft*, 299 F. Supp. 2d 681 (E.D. Ky. 2004) (granting declaratory and injunctive relief against the BOP's cancellation of halfway house program). Neither the APA nor the Declaratory Judgment Act confers jurisdiction; both are remedial. In such cases, jurisdiction lies under 28 U.S.C. § 1331 (federal question). Additionally, under 28 U.S.C. § 1361, the court may compel the BOP to perform its duty to administer a program or to exercise discretion where required by law (but not *how* to exercise that discretion).

[1] For example, in *Simmons*, the prisoner's disqualification from DAP early release was reversed on administrative appeal. 361 F. Supp. 2d at 453.

L. Designation Considerations And Red Flags In The Presentence Report[2]

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

In mid-September 2006, the BOP overhauled its designation policies. The revised Program Statement uses different factors, and weighs them differently, from the policies previously in effect. (The 108-page PDF is available under www.bop.gov .) Regardless of the offense or criminal history, it is likely that a young client who dropped out of high school and is drug addicted – even if a first-time, non-violent offender – will serve harder time under these rules.

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

The following are a few key designation factors:

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

- **Education**: The new rules also assign 2 points for those who do not have a verified high school diploma or are not participating in a GED program. One point is assigned if the client is enrolled in a GED program at sentencing. It is imperative that the PSR

[2] This section was written with the help of federal appellate practitioner and expert BOP advocate (and former AFPD) Peter Goldberger, Attorney at Law, Ardmore, Pennsylvania.

reflect your client's educational level, or that he is participating in a GED program. Be prepared to provide a verified high school diploma or GED certificate. It may not be enough for the court to make a finding, based on believing the defendant's representation, that the person has a GED certificate.

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

- **Detainers**: Under the old and new rules, mention of detainers, pending charges or outstanding warrants in the PSR will result in designation points based on the severity of the pending charge and disqualify clients from many programs and halfway house placement, including DAP early release. Resolve anything outstanding before sentencing, but be aware of the impact that new convictions may have on the criminal history score. The PSR should reflect that they have been resolved. Scoring points are not ordinarily applied for immigration detainers, but a deportable alien public safety factor will apply resulting in at least a low institution.

- **Criminal History**: The new rules for the first time use the Sentencing Guidelines criminal history score, as determined by the judge at sentencing based on the PSR, for security designation purposes. Accordingly, the criminal history section needs special scrutiny and any errors need to be corrected in the PSR, or at a minimum, reflected in the J&C and the Statement of Reasons, even if the criminal history is not material to the particular defendant's sentence (as in some mandatory minimum or career offender cases). If the court makes a favorable finding or finds that the criminal history is overrepresentative, try to get the finding reflected in J&C and Statement of Reasons, including the appropriate criminal history category or score.

- **Current Offense**: The current offense point score is not based on the offense of conviction, but on the "most severe documented instant offense behavior."- For example, if the offense conduct section of the PSR reflects an aggravated assault, but the conviction is only for simple assault, the score will get 7 points as a greatest severity offense instead of 3 as "moderate." (The Offense Severity Scale is Appendix A to the Program Statement.) In drug cases, the severity of the offense is based on amounts. The J&C and Statement of Reasons should reflect all favorable rulings such as that a two-point gun bump was not applied, or that client was responsible for fewer drugs. If necessary, ask that portions of the sentencing transcript be attached to the PSR that is forwarded to the BOP. A particular danger in this area will be the failure of the PSR to distinguish clearly between "instant offense behavior" and mere

"relevant conduct" or even non-"relevant" (whether or not "related") conduct, and in particular conduct of co-conspirators in which the particular defendant was not implicated. Whenever possible, seek to have the Court "clean up" or at least clarify the PSR in these or similar regards and ensure that Probation includes such corrections with the PSR when it is transmitted to BOP for use in the designation process.

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

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

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

The PSFs are:

- Disruptive Group: This is another word for gang affiliation, and applies to males only. Counsel should check that any gang or organized crime affiliation given in the PSR is substantiated, especially if group is listed in Central Inmate Monitoring System. A disruptive group PSF requires high security, unless waived. As a precaution, we have asked that references to prior gang affiliations be redacted from the PSR.

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

- Sex offender: Any current or past history (convictions not necessary) of "aggressive or abusive" sexual conduct (male or female); possession of child pornography; if the PSR indicates questionable or borderline behavior, seek a finding it was not "aggressive or abusive." A sex offender PSF will trigger the sex offender notification requirement.

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

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

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

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

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

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

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

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

When reviewing a PSR, try to be alert to these potential "red flags" that may not affect the guideline rating or otherwise influence the sentence, but can have a beneficial or adverse

effect while your client is incarcerated, including DAP eligibility and boot camp. This admonition applies to all facts which may give rise to a PSF, as well as the facts which will give rise to the security designation score. Seek corrections or clarifications whenever possible, particularly if the PSR mentions it because a co-defendant engaged in the behavior but your client was not involved. These include: suggestions of past sexual misconduct, gang affiliation, violence, use of a telephone for criminal purposes, threats or retaliation against witnesses, gun possession, drug or alcohol abuse (may help get RDAP placement). Relationships to persons who may want to visit should be clear. Address of residence should reflect, if at all possible, the place to which the client will want to return for supervision after imprisonment.

M. Recent Good News For Prisoners

a. The Inmate Financial Responsibility Program

When imposing restitution, courts generally do not set a repayment schedule for the period of imprisonment, leaving it to the BOP to collect monies through the Inmate Financial Responsibility Program. This oversight is good news for prisoners who object to the BOP's practice of taking all but $75 from trust accounts until restitution and other court obligations are satisfied and punishing them with sanctions for non-compliance. In *Soroka v. Daniels*, __ F. Supp. 2d __, 2006 WL 3524381 (D.Or. Dec. 5, 2006), the court held that the BOP did not have any authority to establish a repayment schedule for prisoners. The court reasoned that the Mandatory Victims Restitution Act (MVRA) restitution vested sole authority to the sentencing court to make a payment schedule and "due during period of imprisonment" had not established specific schedule of payments to be collected during incarceration, and under the MVRA, the BOP lacked authority to substitute its own schedule.

b. Literacy Requirement

Section 3624(b) ties good time credit to satisfaction of the literacy requirement required by subsection (f). The BOP rules provide that a prisoner can satisfy the literacy requirement by achieving a GED *or* by completing 400 hours of instruction. Despite the rules, the BOP was requiring prisoners to earn a GED, and would not accept either correspondence school diplomas or 400 hours instruction. Michael Snider tried and tried to satisfy the literacy requirement, taking more than 400 hours of instruction, but not passing his GED. He then spent his own money to take a correspondence course and received his high school diploma. The BOP refused to recognize the diploma and sanctioned him by withholding good time credit and freezing his employment level. He filed a §2241 petition and was granted relief. *Snider v. Davies*, 445 F. Supp. 2d 1233 (D. Or. 2005). The court held the BOP to its own rules holding that Mr. Snider completed the literacy requirement after 400 hours of instructions, and thus was entitled to restoration of good time credit.

Although the opinion will likely be vacated for other reasons, clients can still benefit from the reasoning to hold the BOP to its rules, not its misinterpretation of its rules.

c. Juveniles are entitled to jail credit in the Ninth Circuit

Based on a district court opinion applying an overly literal reading of §3585 that juveniles are not defendants serving sentences, the BOP changed its policy denied jail credit to juveniles. In *Jonah R. v. Carmona,* 446 F.3d 1000 (9th Cir. 2006), the Ninth Circuit did not defer to the BOP interpretation for several interesting reasons, finding instead that Congress certainly intended that juveniles receive jail credit. Unfortunately, the BOP is narrowly interpreting *Jonah.* First, *Jonah* is only controlling in the Ninth Circuit, for those sentenced or housed here. Second, jail credit will only be awarded on a sentence of months, years or days. A sentence of confinement until the age of 21 will not be credited. The good news is that the BOP is reviewing all juveniles in the Ninth Circuit, and will award them jail credit. Hopefully, litigators in other Circuits will take up the cause so that all juveniles will receive the proper credit.

Conclusion

Prison litigation should be just as much a part of representation as pretrial motions and sentencing. The time is real, and the prisoner is vulnerable. Without the assistance of a trained advocate, the chances of successful litigation of prisoners' rights drop precipitously.

The Portland Federal Defender Office, especially Lynn Deffebach, is available for consultation and model pleadings at lynn_deffebach@fd.org.

New Time Limits on Federal Halfway Houses:

Why and how lawyers challenge the Bureau of Prisons shift in correctional policy—and the courts' response

By Todd Bussert, Peter Goldberger, and Mary Price

In an abrupt about-face, the federal Bureau of Prisons (BOP) in December 2002 abandoned long-standing policies governing the use of Community Corrections Centers (CCC). BOP announced that it would no longer send prisoners directly to CCCs to serve their sentences and would limit prerelease halfway house placements to the final 10 percent of a prisoner's time to serve. Prisoners, lawyers, and judges reacted quickly to the news that BOP would not honor judicial recommendations for halfway house placements. BOP found itself defending a raft of lawsuits and attending resentencings. Meanwhile, other prisoners, who would have been eligible to spend six months in a CCC prior to release from federal custody regardless of sentence length, cried foul and petitioned for relief. Courts around the country invalidated the 2002 rule changes, finding that they unilaterally, and contrary to legislative intent, redefined "place of imprisonment." Courts also ruled that BOP had failed to comply with Administrative Procedures Act (APA) requirements when it substantively amended its regulations without either notice or an opportunity for public comment. For a time, the bureau avoided precedential repudiation of its rule change by declining to appeal adverse court decisions, resulting in individual relief but not systemic change and frustrating efforts by opponents who wanted an opportunity to address the underlying issues. Ultimately, the circuit courts that considered the issue invalidated the rule change. More recent BOP efforts to codify the change consistent with APA requirements have also met with judicial skepticism and opposition. Critics charge, and courts agree, that the bureau is trying to shed its statutory obligation to exercise individualized discretion when deciding where to incarcerate a prisoner and when to release a prisoner to a halfway house to prepare for reentry at the end of a sentence. This article provides a guide to the rule changes and the efforts to reverse them.

The Bureau of Prisons traces its origins to the Three Prisons Act of 1891 and the Federal Bureau of Prisons Act of 1930. Today it operates the nation's largest prison system, housing more than 188,000 prisoners in more than 100 institutions. The agency traditionally used community-based facilities as places of imprisonment for qualified inmates based on individualized placement and programming needs. In the mid-1960s, following enactment of the Prisoner Rehabilitation Act, BOP expanded halfway house use for those needing substance abuse treatment and, later, for any prisoner who might benefit from and be safely managed in structured community-based confinement. Then-BOP Director Myrl E. Alexander emphasized that reentry support was central to the agency's mission of preparing "our clientele for community adjustment rather than adjustment to probation or to the correctional institution."

Community corrections grew through the 1970s and 1980s, becoming a standard component of the agency's overall range of placement options. Congress expressly provided for BOP's use of residential treatment centers as places of imprisonment in 18 U.S.C. §§ 4082(a) and (c) and reaffirmed the agency's designation responsibilities in promulgating the Sentencing Reform Act of 1984 (SRA). Through 18 U.S.C. § 3621(b), Congress authorized BOP to "designate the place of the prisoner's imprisonment" at "any available penal or correctional facility that meets minimum standards of health and habitability." Significantly, as part of section 3621(b), Congress directed that the bureau consider certain factors when making any placement decision. They include offender-specific variables such as "the history and characteristics of the prisoner," "the nature and circumstances of the offense," and sentencing courts' statements concerning a sentence's purpose or facility recommendations. In 1985, BOP's general counsel issued a legal opinion interpreting the phrase "penal or correctional facility" in section 3621(b) as coincident with "institution or facility" in the former 18 U.S.C. § 4082(a).

In 1990, the statutory definition of "imprisonment" expanded to include home confinement when employed at the end of a prisoner's sentence. (18 U.S.C. § 3624(c).) In so broadening BOP's placement options, Congress did not amend section 3621(b) or otherwise modify the agency's

designation authority. Indeed, the House Committee on the Judiciary had originally reported a bill that would have allowed initial designations of sentenced prisoners to "home detention." But, confronted with objections to such a change, negotiators crafted a compromise that moved the language to section 3624(c) and limited home confinement to the final 10 percent of a prisoner's time to serve. The bill's cosponsor explained that the amendment left "the law as it is" with respect to initial designations.

Shortly after section 3624(c)'s enactment, BOP issued a written policy statement that announced its intention to "promote greater use of community corrections programs for low risk offenders." The bureau acknowledged that "[t]here is no statutory limit on the amount of time inmates may spend in CCCs" and instructed that, "[u]nless the warden determines otherwise, minimum security inmates will ordinarily be referred [for CCC placement at the end of their sentences] for a period of 120 to 180 days." This 120- to 180-day prerelease objective section relies on section 3621(b) to exceed substantially, for shorter sentences, the bureau's minimum statutory obligation under section 3624(c) to "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 the prisoner's re-entry into the community." Because BOP understood section 3621 to still permit the use of CCCs as facilities for service of any part of a sentence, in appropriate cases, it designated a halfway house for the duration of a prisoner's sentence. Prerelease transfer decisions were based on a prisoner's perceived "transitional need" (for example, employment prospects, available housing) and without regard to sentence length.

The Department of Justice's Office of Legal Counsel (OLC) upheld the bureau's analysis and flexible use of CCCs in a 1992 legal opinion:

> There is . . . no basis in section 3621(b) for distinguishing between residential community facilities and secure facilities. Because the plain language of section 3621(b) allows BOP to designate 'any available penal or correctional facility,' we are unwilling to find a limitation on that designation authority based on legislative history. Moreover, the subsequent deletion of the definition of 'facility' further undermines the argument that Congress intended to distinguish between residential community facilities and other kinds of facilities.

(Statutory Authority to Contract with the Private Sector for Secure Facilities, 16 Op. Off. Legal Counsel 65 (1992).)

The bureau discussed its CCC practices in a 1994 report to Congress, explaining that, in keeping with the objective of housing prisoners "in the least restrictive environment consistent with correctional needs," it had created a two-part community corrections model that differentiated between those designated to CCCs to serve their entire sentences and those placed there in preparation for reentry. The bureau described a "community corrections component" used for direct commitments that was "sufficiently punitive to be a legitimate sanction, meeting the needs of the court and society, yet allowing the offender to undertake other responsibilities, such as participation in work, substance abuse education, and community service." The prerelease component, on the other hand, was for those nearing the ends of their sentences—ordinarily not to exceed six months—
to "assist offenders in making the transition from an institutional setting to the community. . . ."

The bureau's view of sanctioned CCC usage remained constant in all versions of its official written policy statements. For example, Program Statement 7310.04 provides: "[T]he Bureau is not restricted by § 3624(c) in designating a CCC for an inmate and may place an inmate in a CCC for more than the 'last ten per centum of the term,' or more than six months, if appropriate. Section 3624(c), however, does restrict the Bureau in placing inmates on home confinement."

So it was until December 2002, when BOP, as directed by the Justice Department, changed its CCC practices.

December 2002 rule changes

Punishment of white-collar offenders trumps sound correctional principles. On December 13, 2002, the Department of Justice's Office of Legal Counsel (OLC) issued a memorandum opinion to then-Deputy Attorney General Larry Thompson concerning a question posed by his office: "whether BOP has general authority, either upon recommendation of the sentencing judge or otherwise, to place [a low-risk and nonviolent] offender [who

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receives a short sentence of imprisonment] directly in community confinement at the outset of his sentence or to transfer him from prison to community confinement during the course of his sentence." The OLC concluded that the bureau's long-standing practice was "unlawful" and that a federal offender sentenced to a term of imprisonment could not be placed at a CCC without regard to sentence length. The opinion relied both on the Federal Sentencing Guidelines, particularly section 5C1.1 and guidelines references to "community confinement" as contrasted with "imprisonment," and on 18 U.S.C. § 3624(c), which it interpreted as restricting the bureau's designation authority under section 3621(b).

> In sum: When a federal offender receives a Zone C or Zone D sentence of imprisonment, section 3621 and section 3622 of title 18 do not give BOP general authority to place the offender in community confinement from the outset of his sentence. Nor do they give BOP general authority to transfer him from prison to community confinement at any time BOP chooses during the course of his sentence.

(Bureau of Prisons Practice of Placing in Community Confinement Certain Offenders Who Have Received Sentences of Imprisonment, Mem. Op. for Ass't Att'y Gen. (Dec. 13, 2002).)

The OLC opinion thus treated the U.S. Sentencing Guidelines, which are directed at cabining judges' sentencing choices, as binding the bureau in its implementation of those sentences once chosen. Three days after the OLC memorandum issued, Thompson drafted a memorandum to BOP Director Kathleen Hawk Sawyer instructing the bureau to immediately modify its CCC practices: "The OLC opinion concludes that the BOP is obligated to adhere strictly not only to statutory directives, but also to all placement requirements and policies set forth in the Federal Sentencing Guidelines. . . . To ignore the Guidelines is to promote the very disparity in sentencing that the Guidelines seek to eliminate." Although unmentioned in the OLC opinion, Thompson added that "[a]nother concern regarding BOP's CCC placement policies is its potentially disproportionate, and inappropriately favorable, impact on so-called 'white-collar' criminals," concluding:

> BOP's current placement practices run the risk of eroding public confidence in the federal judicial system. White collar criminals are no less deserving of incarceration, if mandated by the Sentencing Guidelines, than conventional offenders. Indeed, such individuals are often better educated and more rational than other criminals and are thus more likely to weigh the risks of possible courses of action against the anticipated rewards of criminal behavior. As many studies have shown, the prospect of prison—more than any other sanction—is feared by white collar criminals and has a powerful deterrent effect. Moreover, white collar crimes often involve not only a high level of intent and calculation, but are committed over an extended period of time, making the punitive dimension of prison especially deserved in many cases. With this memorandum, and the accompanying OLC opinion issued last week, I am confident that the Department of Justice is taking an important step toward ensuring the proper and fair enforcement of the law.

(Memorandum from Larry Thompson to Kathleen Hawks Sawyer (Dec. 16, 2002) (on file with the author).)

> The OLC treated the Guidelines as binding.

On December 20, 2002, Hawks Sawyer issued a memorandum to federal judges announcing that "effective immediately," BOP would no longer place sentenced defendants directly into CCCs, regardless of judicial recommendations under 18 U.S.C. § 3621(b)(4). Her memorandum did not mention the new restrictions on prerelease transfers to CCCs, limiting them to the lesser of the final 10 percent of a prisoner's time served or six months. In other words, with few exceptions, individuals sentenced to less than 70 months' imprisonment—the sentence that yields 60 months to serve, assuming good behavior—were from that point forward ineligible for transfer up to 180 days prior to release, thereby limiting reentry opportunities for thousands of prisoners without accounting for section 3621(b) considerations or their particular transitional needs.

Newsweek disclosed the policy shift, made with neither notice nor opportunity to comment, in a Web-exclusive article that quoted unnamed Justice Department officials:

> The new policy move, officials said, is partly intended to strengthen the hands of federal prosecutors in high-priority cases like the Enron and WorldCom

> scandals. Officials say they are trying to signal to reluctant targets in those cases that they should cooperate with the government—or else. 'There's a clear signal being sent here,' says one department official. 'We're not going to tolerate preferential treatment for rich corporate executives who have broken the law.'

(Michael Isikoff, *Hard Time for Corporate Perps: John Ashcroft says white-collar felons will now have to serve their sentences in prisons,* NEWSWEEK (Dec. 20, 2002). The article declared that a letter from a West Virginia district court judge expressing dissatisfaction with BOP's placement of a tax offender at a CCC motivated the Attorney General's Office to initiate its review. However, subsequent media accounts suggest that, in reality, prosecutorial displeasure prompted the action. (Tom Schoenberg, *Halfway House Backlash*, LEGAL TIMES (Feb. 10, 2003) ("U.S. District Judge Joseph Goodwin tried to sanction a prosecutor for arguing that the defendant could not be sentenced to a halfway house.").) Moreover, where officials reportedly told *Newsweek* that the Justice Department was unaware of BOP's CCC practices until 2001, the Solicitor General's brief in *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001) referred to it: "[T]he BOP employs [CCCs] as an alternative to 'institutional confinement for certain short-term offenders.' " Indeed, aside from the aforementioned 1992 OLC memorandum and formal BOP statements, defense counsel, with federal prosecutors' knowledge and occasional consent, commonly requested nonbinding, written recommendations for direct CCC designations in defendants' judgment orders. As explained in the 1995 and 2000 editions of the Justice Department-published *Judicial Guide to the Federal Bureau of Prisons*, BOP honored such requests when, in its judgment, direct placement in a CCC was consistent with policy and sound correctional principles. Finally, it is noteworthy that contrary to the Justice Department's assertions to *Newsweek* and others, "[BOP] officials said that halfway houses have been used for nonviolent offenders for at least 20 years. 'The point is that it's not just white-collar offenders who have benefited from this longstanding practice,' said . . . a spokeswoman for the bureau. 'There are a lot of drug offenders, single moms and ordinary folks who aren't wealthy people who have benefited from this. It's not just Enron types.' " (Eric Lichtblau, *Criticism of Sentencing Plan for White-Collar Criminals*, N.Y. TIMES (Dec. 26, 2002).)

As U.S. District Judge Ellen Segal Huvelle learned through testimony given during a hearing concerning the rule change, more than a third of the prisoners designated to serve their entire sentences in CCCs at the time the policy changed were female, even though women comprise less than 7 percent of the general federal prison population. (*Cutler v. United States*, 241 F. Supp. 2d 19, 23 n.3 (D.D.C. 2003).) Cutler did not meet the "rich corporative executive" profile supposedly targeted by the Justice Department's action, nor did any significant number of the affected prisoners, male or female.

Legal challenges to rule changes

The rule changes applied immediately and retroactively to an estimated 132 prisoners then designated to CCCs and to an undetermined number of other sentenced offenders preparing to self-surrender to CCCs based on judicial recommendations and related designation orders. Consequently, this "front-end" group of direct designees initiated the first round of litigation. Petitioners moved to enjoin BOP from relocating them to prison camps or metropolitan detention center minimum-security work cadres. Overwhelmingly, district courts granted relief, citing the attorney general's improper reliance on the Sentencing Guidelines over federal statutes, the OLC's erroneous reinterpretation of "place of imprisonment" under section 3621(b), and BOP's failure to adhere to the APA's notice-and-comment requirements. Some courts also found a violation of the Ex Post Facto Clause. However, given both BOP's refusal to honor judicial requests for direct CCC placements for those sentenced after the rule change and the government's willingness to settle any appeals that did not become moot by allowing sentenced prisoners to serve their entire sentences at CCCs, the front-end litigation gradually subsided, and focus shifted to the "back-end," that is, prisoners awaiting prerelease transfers affected by the new 10 percent limitation.

Back-end petitioners challenged the December 2002 rule on three principal grounds: (a) restrictions on CCC placement based on definitions found in the U.S. Sentencing Guidelines and on the "not more than 10 percent" language in 18 U.S.C. § 3624(c) misinterpreted that statute, invoked the guidelines in a context where they had no application, and misconstrued BOP's broad designation authority under 18 U.S.C. § 3621(b); (b) BOP avoided its obligation to subject the rule change to notice and comment under the APA; and (c) retroactive application to those whose offenses were committed before December 2002 violated the Ex Post Facto Clause. Just as in the front-end cases, district courts generally disfavored the bureau's attempts to restrict CCC use, ordering instead that the agency reconsider individual prisoner's halfway house eligibility consistent with pre-December 2002 practices.

An interesting feature of the litigation was the government's apparent reluctance to permit its losses from becoming potentially binding precedent. Instead of appealing any of the numerous adverse rulings, BOP accommodated courts' rulings in individual cases.

Consequently, it minimized the impact of petitioner-favorable decisions and compelled prisoners—many of whom were indigent and without benefit of counsel—to file individual petitions under 28 U.S.C. § 2241 even where a consensus view from judges in a particular district existed. (*See United States v. Arthur*, 367 F.3d 119 (2d Cir. 2004) ("A district court of this Circuit has recently determined that 'the vast majority' of courts to consider the matter have 'held that the new policy was unlawful.' ").) Thus, it was nearly two years before the first appellate court ruled on the merits of the statutory interpretation issue, rejecting each of BOP's arguments and holding that:

- 18 U.S.C. § 3624(c) imposes an affirmative obligation on the BOP to ensure pre-release placement, when practical, for the final 10% of a prisoner's time served, up to six months, but does not prohibit community confinement or other prerelease alternatives at any earlier time during a sentence of imprisonment;
- a CCC is unambiguously a "place of imprisonment" (*i.e.*, a penal or correctional facility) under the plain language of 18 U.S.C. § 3621, observing: "If, as both parties agree, a CCC may be a place of imprisonment during the last ten percent of a prisoner's term of imprisonment, it would be incongruous to conclude that the same CCC may not be a place of imprisonment during any portion of the first ninety percent of that term"; and
- reliance on the Sentencing Guidelines' supposed limitations for sentences of imprisonment is misplaced: "[T]he Guidelines are binding only on the courts. They do not address the BOP's use of its discretion as the custodian of federal prisoners to designate the appropriate place of imprisonment."

(*Goldings v. Winn*, 383 F.3d 17 (1st Cir. 2004).)

In sum, the First Circuit held, as did the Eighth soon after in *Elwood v. Jeter*, 386 F.3d 842 (8th Cir. 2004), "that 18 U.S.C. § 3621(b) authorizes the BOP to transfer [a prisoner] to a CCC at any time during her prison term. The BOP's discretionary authority under § 3621(b) is not subject to the temporal limitations of 18 U.S.C. § 3624(c)."

For prisoners housed in these circuits, *Goldings* and *Elwood* barred BOP's continued enforcement of the December 2002 rule change. Likewise, nonviolent offenders facing short periods of incarceration were again eligible for direct halfway house commitments. However, the victories were short-lived. Two-and-a-half years after improvidently changing its established CCC practices, BOP invoked the APA process in an effort to insulate those changes from further challenge. In August 2004, the agency published proposed "new rules" in the *Federal Register* for notice-and-comment that mirrored precisely the December 2002 OLC opinion and its previous rule changes.

The February 2005 rule

Couched as a "categorical exercise of discretion for designating inmates to community confinement when serving terms of imprisonment," the proposed rules declared BOP's intention to limit community confinement to prerelease purposes "which will afford the prisoner a reasonable opportunity to adjust to and prepare for re-entry into the community." The bureau further made clear that prerelease halfway house use would be restricted to: "the last ten percent of the prison sentence being served, not to exceed 6 months." Having purportedly considered the nonexclusive list of factors that section 3621(b) sets out for each prisoner's designation, BOP offered four chief considerations for the rule changes: (a) promotion of consistency, (b) facility resources, (c) sentencing commission policy statements, and (d) congressional sentencing policy. The bureau received 26 comments concerning the *Federal Register* notice — only one supported the proposed changes.

Promotion of consistency. BOP asserted that its pre-December 2002 CCC practices "created the possibility that it would unintentionally treat similar inmates differently." In their comments on the proposal, Families Against Mandatory Minimums (FAMM) and the National Association of Criminal Defense Lawyers (NACDL) questioned the appropriateness of measures to eliminate a potential for unintentional disparity in the absence of any evidence of actual unfairness or error. The better course, the organizations submitted, was to add to the rules a caution against favoritism. The bureau responded, "[W]e made no assertion that the Bureau had, in fact, treated inmates differently or shown favoritism. Rather, we stated that the previous procedures created the possibility that we would unintentionally treat similar inmates differently or, at least, the perception that such a possibility existed. We do not believe that a statement analyzing the previous situation requires further empirical support."

Consideration of facility resources. BOP's declaration that experience showed CCCs are "particularly well suited as placement options for the final portion of offenders' prison terms" prompted a host of comments. NACDL cited the 1994 congressional report as well as a lawsuit brought against the agency by one of its largest CCC providers alleging that the decrease in direct commitments jeopardized both its financial viability and prisoner rehabilitation efforts. Several groups, including The Center for Community Corrections and Project Rehab, stated that the time afforded by the 10 percent limitation was inadequate for many prisoners' successful reentry. The International Community Corrections Association (ICCA) stressed that "an offender [who] arrives at the halfway house without prospects of housing, employment, or even identification, will need four to six months to prepare to return to an

unstructured environment." The ICCA also asserted that "most transitional programming consumes the better part of a 120-day stay." and observed that under the 10 percent rule "a six-month pre-release placement would not have been possible for the more than 75% of all federal offenders sentenced to prison in 2001 who received a term of less than 70 months."

Without addressing any of these length-of-stay points directly, the bureau's response reiterated the rationale offered in the notice. Neither the notice nor the response stated how limiting halfway house time to the final 10 percent of a prisoner's time served furthered the "characteristics" and "advantages" the agency claimed make CCCs best suited for prerelease purposes. BOP also ignored comments about the suitability of CCCs for the full service of short sentences where a defendant may need its resources, as well as those emphasizing that some prisoners require a longer time for adjustment prior to release than the 10 percent rule allows.

Consideration of sentencing commission policy statements. Like the OLC, the bureau attempted to find support for its position in U.S. Sentencing Guidelines section 5C1.1. Despite acknowledging that guidelines promulgated under 28 U.S.C. § 994(a)(1) are legally distinct from the "policy statements" drafted pursuant to 28 U.S.C. § 994(a)(2), which section 3621(b) requires it to weigh, BOP argued that section 5C1.1 "reflects the Commission's policy determination generally to restrict the availability of community confinement in lieu of imprisonment." NACDL highlighted *Goldings*'s wholesale rejection of this line of argument, and FAMM submitted that 5C1.1 "does not express a 'general restriction' on the availability of community confinement." As courts have recognized, the Sentencing Guidelines do not trump BOP's statutory authority under 18 U.S.C. § 3621 to determine the appropriate place of imprisonment. Two days after BOP issued its response, the Supreme Court held in *United States v. Booker*, 543 U.S. 220 (2005) that the Sentencing Guidelines are not binding even on the courts, further weakening the suggestion that they control an executive agency's actions.

Consideration of congressional sentencing policy. "Whether or not Section 3624(c) precludes the Bureau from designating a prisoner to community confinement for longer than the lesser of the last 10% of the sentence or six months, it is consistent with congressional policy reflected in that section for the Bureau to exercise its discretion to decline to designate a prisoner to community confinement for longer than that time period. In addition to furthering the sentencing policy reflected in Section 3624(c), the proposed rules further Congress' determination that one of the important purposes of sentencing is to deter criminal conduct. *See* 18 U.S.C. 3553(a)(2)(B)." As noted above, this assertion in BOP's August 2004 notice is contrary to the 1990 legislative history. Moreover, FAMM pointed out that there is waning support for the proposition that Congress "clearly indicated" in section 3624(c) a preference for the 10 percent limitation for CCC placements: "[C]ourts have relied upon the plain meaning of the statute to find that § 3624(c) only sets forth the extent of a prisoner's entitlement to consideration for a pre-release adjustment . . . whether in a CCC or some place else." Although acknowledging this fact, the bureau's response fell back again on the desire "to exercise discretion to minimize the potential for disparity of treatment," concluding that it acted rationally and justifiably.

Litigation over the new rule, which went into effect on February 14, 2005, has divided the courts. Some have found that BOP impermissibly acted categorically in an area where it is required, by statute, to make individualized determinations. Others defer to the bureau's discretion, citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) and *Lopez v. Davis*, 531 U.S. 230 (2001), which upheld the bureau's implementation of a different categorical exclusion called for by statute. The first appellate court to address the February 2005 rule has, like its sister circuits that struck down the December 2002 changes, found them invalid.

> The better course was to add a caution against favoritism.

In *Woodall v. Federal Bureau of Prisons*, 432 F.3d 235 (3d Cir. 2005), the court of appeals held that the February 2005 rule mistakenly ignores the enumerated factors the bureau must consider under 18 U.S.C. § 3621(b) when making placement and transfer determinations. Former Chief Judge Becker's opinion for the divided panel distinguished *Lopez*'s categorical approach, because, unlike the statute in that case, section 3621(b) mandates individualized determinations without limitations. The panel also found that the 2005 rule is not entitled to *Chevron* deference because it is both contrary to clear congressional intent and based on impermissible statutory construction, and, thus, unreasonable. Though not addressed in *Woodall*, some litigants have also relied on *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983) for the proposition that BOP

acted arbitrarily and capriciously by largely ignoring the comments received in response to the proposed rule and, therefore, did not satisfy the APA in that respect as well.

Conclusion

The president featured prisoner reentry in the 2004 State of the Union address and the following summer publicly declared a desire to assist the 600,000 men and women who are being released from prison each year: "Let's make sure we're the country of the second chance. Let's make sure people have got a chance to get an education and a job." (President George H.W. Bush, remarks by the president to the 2004 National Urban League Conference (July 23, 2004).) The former attorney general, who oversaw a $100 million grant initiative designed to encourage states to focus on reentry initiatives, echoed these sentiments:

> Effective re-entry programs also help individuals who have paid a debt to society to return to their communities, to make up for lost ground, and to redeem themselves. A strong and successful re-entry program presents the best opportunity for inmates to become solid citizens upon release. As President Bush has said, 'America is the land of second chances, and when the gates of the prison open, the path ahead should lead to a better life.'

(Att'y Gen. John Ashcroft, prepared remarks at the Department of Justice Offender Re-entry Conference (Cleveland, Ohio, Sept. 30, 2004).)

These statements parallel those submitted by the ABA concerning the formal rule change. In its 2004 comments, the ABA noted that, in August 2002, the House of Delegates approved the *20-Point Blueprint for Cost-Effective Pretrial Detention, Sentencing and Corrections Systems*. The blueprint promotes the use of community corrections among other reasoned, cost-effective measures. The ABA also referred to four reports issued by the ABA's Justice Kennedy Commission recommending, among other things, that government officials take steps necessary to ease the transition from prison to the community, including assistance in finding transitional housing, job placement, substance abuse treatment, and the like.

The Bureau of Prisons' hasty rule change belies decades of sound agency practice. Leaving aside the propriety of upending established correctional management practices to promote maximized punishment for white-collar offenders, the ends that the Justice Department sought to achieve could have been brought about without affecting all federal prisoners serving less than six-year sentences. BOP could have, as it has in the past, limited programming opportunities to those they will directly benefit. For instance, prior to the termination of the boot camp program in June 2005, the bureau barred participation by inmates "demonstrating a stable employment/educational/military history, etc." because they were seen as lacking requisite program needs. BOP could have reasonably amended its CCC practices to ensure that white-collar defendants did not receive some undue, preferential benefit. Refusing access to Community Corrections Centers increases the chance of recidivism and the associated costs of prosecution and incarceration. It is also detrimental to thousands of federal prisoners, their families, and the communities to which they will return, while needlessly exacerbating mounting prison costs without any corresponding social benefit in crime control. ■

CJA News: January 2, 2006

Sexually Dangerous Persons

BOP has a new tool authorized this summer as part of the Adam Walsh Act. BOP may now "certify" inmates as "sexually dangerous persons" (SDP). Certification can occur prior to sentencing, **or** at any time after the commencement of probation or supervised release and prior to the completion of the sentence. We will all need to pay attention to the risk of this new federal SDP designation, 18 U.S.C. 4248.

SDP Commitment

In the past couple of weeks, Defenders in New Mexico, South Dakota and Massachusetts have learned that just prior to release, clients are being transferred to the Butner, NC Federal Medical Center and certified as SDPs, based on a caseworker's review of records. We are told that of 500 cases reviewed to date, proceedings have been initiated in 11.

A "sexually dangerous person" is one who "has engaged or attempted to engage in sexually violent conduct or child molestation and . . . suffers from a serious mental illness, abnormality or disorder resulting in serious difficulty refraining from sexually violent conduct or child molestation if released." 18 U.S.C. 4247. The definition was added to the existing definitional statue in the in chapter 313 of title 18 which addresses mental disease or defect.

The Attorney General and/or the Director of the Bureau of Prisons may certify that a person is a "sexually dangerous person," 18 U.S.C. 4248, "[a]t any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, **or** at any time after the commencement of probation or supervised release and prior to the completion of the sentence." 18 U.S.C. 4241(a). Note that under amended 18 U.S.C. § 3583(k), those convicted of violating 18 U.S.C. § 1201 (kidnapping) involving a minor, or of any offense under 18 U.S.C. §§ 1591(sexual trafficking of children), 2241 (aggravated sexual abuse), 2242 (sexual abuse), 2243 (sexual abuse of a minor), 2244 abusive sexual contact), 2245 (sexual abuse resulting in death), 2250 (failure to register as a sex offender), 2251 (sexual exploitation of children), 2251A (selling or buying children), 2252 (activities related to material involving sexual exploitation of minors), 2252A (child pornography), 2260 (production of child pornography), must be placed on supervised release for a mandatory minimum term of 5 years with a maximum of life.

We can expect review by BOP of anything in the PSR. The review may include psychological evaluations submitted by the defendant or ordered by the court for sentencing purposes, previous state or federal sex offenses, **and** anything in the BOP record, including admissions and other evidence gathered in the course of sex offender treatment or management.

At some point after a certificate has been filed, the person is entitled to an

adversarial hearing with the right to counsel, the opportunity to testify, to present evidence, subpoena witnesses, and confront and cross-examine witnesses. 18 U.S.C. §4246. CJA counsel or a Federal Defender will be appointed for those who qualify. The statute does not contain a timetable for a hearing and the person remains in the custody of the Attorney General or the Bureau of Prisons pending resolution. 18 U.S.C. 4247(d), 4248(a)-(b).

How to Advise Clients

At a minimum, we need to advise clients charged with sex offenses or with any hint of sexual impropriety in their record that anything they disclose in the sentencing process, or in sex offender or substance abuse "treatment," or in any conversation with a BOP caseworker or counselor may be used to commit them, possibly for life.

Sex offender treatment is voluntary. Sex offender management appears to be BOP's choice. If a client volunteers for treatment, or is placed in a sex offender management program, then refuses to talk, BOP will assume the worst. If they talk, they run a risk of talking themselves into a 4248 commitment. Based on the numbers so far, BOP has sought commitments in roughly 2.5 % of cases reviewed. BOP retains the burden of proving that the client is a "sexually dangerous person", BUT the client remains detained pending that hearing and determination. Currently we expect the less BOP has to work with the better. Until we see how widespread SDP commitments are and how the courts will react to these cases, volunteering for treatment carries a real risk. In a management program trying to remain silent may be nearly impossible depending on the context and the client.

We need to be advising clients charged with sex offenses or with any hint of sexual impropriety in their record that anything they disclose in the sentencing process, or in sex offender or substance abuse "treatment," or anything they might say to a BOP counselor or caseworker may (will) be used against them for a possible SDP civil commitment under 18 U.S.C. 4248. Advise clients on the risks of participating in any voluntary treatment program, the choice not to participate, the option of remaining silent in any mandatory management program, and the remind them of the 5th Amendment rights regarding sexual misconduct or thoughts during any interaction or conversations with BOP personnel.

> "While the Fifth Amendment does not generally attach in civil commitment proceedings, it may nonetheless apply where a truthful answer might incriminate a defendant in future criminal proceedings or increase his punishment". See ***Allen v. Illinois***, 478 U.S. 364, 372, 106 S. Ct. 2988, 92 L. Ed. 2d 296 (1986); ***Estelle v. Smith***, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981).

> "The Government retains the burden of proving facts relevant to the crime at the sentencing phase and cannot enlist the defendant in this process at the expense of the self-incrimination privilege," and no negative inference may be drawn from exercise of right to remain silent. ***Mitchell v. US***, 526 U.S. 314 (1999)(upholding a Defendant's right to remain silent regarding facts *beyond the offense of conviction* that may be used to enhance a sentence).

For some ideas, see the cases addressing sex offender treatment which in the past often including use of polygraphs, as a condition of supervised release. These cases look at some of the 5th Amendment issues. Several circuits have endorsed polygraph testing as part of sex offender treatment for those on supervised release. See; i.e.

- ***United States v. York***, 357 F.3d 14, 22 (1st Cir. 2004);
- ***United States v. Dotson***, 324 F.3d 256, 261 (4th Cir. 2003);
- ***United States v. Lee***, 315 F.3d 206, 213 (3d Cir. 2003);
- ***United States v. Zinn***, 321 F.3d 1084, 1089-90 (11th Cir. 2003)(a polygraph "may provide an added incentive for the offender to furnish truthful testimony to the probation officer. Such purpose would assist the officer in his or her supervision and monitoring of the appellant.)

A case that stands for stronger 5th amendment rights is ***United States v. Antelope***, 395 F.3d 1128 (9th Cir. 2005)(defendant who had been incarcerated for a refusal to answer questions that he deemed incriminating while on supervised release could raise a Fifth Amendment challenge to the revocation of that release.) the case notes the difference between admitting conduct to which you have been convicted vs. uncharged conduct.

On penile plethysmograph testing as a condition of supervised release see ***United States v. Weber***, 451 F.3d 552 (9th Cir. 2006)(the particularly significant liberty interest in being free from plethysmograph testing requires a thorough, on-the-record inquiry into whether the degree of intrusion caused by such testing is reasonably necessary 'to accomplish one or more of the factors listed in § 3583(d)(1)' and 'involves no greater deprivation of liberty than is reasonably necessary, given the available alternatives.)

Of the 16 states with Sexually Violent Predator commitment laws, ALL but MN and ND require underlying conviction for a sex offense and most require a violent sex offense (or that the Defendant be found incompetent to stand trial on such an offense). The new federal law (18 U.S.C. 4248) makes any Defendant in BOP custody potentially eligible, and can result in lifelong civil incarceration that bears no relationship to underlying federal offense. The burden of proof in many states is beyond a reasonable doubt and some states require or at least allow for jury trial. The federal law uses a "clear and convincing" standard. The procedure is outlined in 18 U.S. C. 4247 and 4248 and is generally the same as

used for a mental health civil commitment. Commitment hearings will occur in the district where the defendant is held (i.e. location of the prison), not the district which handled the underlying federal criminal conviction.

Sex Offender Treatment and Management Programs

BOP currently has one sex offender treatment program (SOTP) at Butner with 112 beds, and a sex offender management program (SOMP) at Devens with 400 participants. In the Adam Walsh Act, Congress directed BOP to expand these programs. See 18 U.S.C. §3621(f)(1). According to Dr. Andres Hernandez, the Director of Sex Offender Treatment for BOP, the BOP is "actively working to expand sex offender services by implementing SOMPs and SOTPs, as well as a forensic evaluation service." See Statement of Andres E. Hernandez before the Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, U.S. House of Representatives (hereinafter Hernandez Statement), copy attached, also available at http://energycommerce.house.gov/108/Hearings/09262006hearing2039/Hernandez.pdf

BOP counts as "sex offenders" those serving a sentence for a sex offense **and** those with any sex offense in their history. This regulation has been struck down for including past offenses, but it remains on the books and BOP continues to follow it. See ***Fox v. Lappin***, 409 F. Supp.2d 79 (D. Mass. 2006) (enjoining BOP from notifying local jurisdiction under section 4042(c) of release of prisoner serving federal felon in possession sentence based on 1981 state sex offense); ***Simmons v. Nash***, 361 F.Supp.2d 452 (D.N.J. 2005) (enjoining BOP from notifying local jurisdiction under section 4042(c) of release of prisoner serving federal drug sentence based on 1983 state offense of attempting to promote adult prostitution). See ***United States v. Whitney***, 2006 U.S. Dist. LEXIS 74524 (D. Mass. Oct. 26, 2006)(Civil commitment sought for drug defendant with a juvenile history of sexual assaults).

Inmates participating in the SOTP do so on a voluntary basis, are subjected to polygraph exams and penile plethysmography, must accept responsibility for their "crimes," and are either required or encouraged to admit previously undetected offenses and bad thoughts. BOP keeps a record of all of this. Dr. Hernandez used this information in studies, which he reported to treatment professionals and to Congress, finding that while only a small percentage of Internet offenders had known contact offenses at the time of sentencing, over 80% disclosed contact offenses during "treatment." Dr. Hernandez concluded, "these Internet child pornographers are far more dangerous to society than we previously thought." See Hernandez Statement.

Sex offender management involves "risk assessment" and "management." This apparently is not voluntary. It is a way to segregate sex offenders and control

what they do, say and read. It may also involve disclosure of undetected offenses and bad thoughts.

Dr. Hernandez' testimony seems to push for a BOP assumption that regardless of what our clients have actually been convicted of, or admitted, most "sex crime" related clients are dangerous, serial hands-on sex abusers. For example, Dr. Hernandez says, "Eighty-five percent of inmates [convicted of possessing or distributing child pornography] were in fact contact sexual offenders, compared to only 26 percent known at the time of sentencing." His message; in reality the "lookers" are really "touchers" so they are dangerous. As for his facts, those come from the self confessions of those he and the BOP work with.

My thanks to fellow defender Miriam Conrad for much of the SDP information in this article.

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"Any opinions expressed of those of the author and do not represent a specific position of the Federal Defender or the U.S. Courts."

18 USCS § 4247
CURRENT THROUGH P.L. 109-440, APPROVED 12/20/2006

TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART III. PRISONS AND PRISONERS
CHAPTER 313. OFFENDERS WITH MENTAL DISEASE OR DEFECT

18 USCS § 4247

§ 4247. General provisions for chapter

(a) Definitions. As used in this chapter [18 USCS §§ 4241 et seq.]--

(1) "rehabilitation program" includes--

(A) basic educational training that will assist the individual in understanding the society to which he will return and that will assist him in understanding the magnitude of his offense and its impact on society;

(B) vocational training that will assist the individual in contributing to, and in participating in, the society to which he will return;

(C) drug, alcohol, and sex offender treatment programs, and other treatment programs that will assist the individual in overcoming a psychological or physical dependence or any condition that makes the individual dangerous to others; and

(D) organized physical sports and recreation programs;

(2) "suitable facility" means a facility that is suitable to provide care or treatment given the nature of the offense and the characteristics of the defendant;

(3) "State" includes the District of Columbia;

(4) "bodily injury" includes sexual abuse;

(5) "sexually dangerous person" means a person who has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others; and

(6) "sexually dangerous to others" with respect a person, means that the person suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released.

(b) Psychiatric or psychological examination. A psychiatric or psychological examination ordered pursuant to this chapter shall be conducted by a licensed or certified psychiatrist or psychologist, or, if the court finds it appropriate, by more than one such examiner. Each examiner shall be designated by the court, except that if the examination is ordered under section 4245, 4246, or 4248 [18 USCS § 4245 , 4246, or 4248], upon the request of the defendant an additional examiner may be selected by the defendant. For the purposes of an examination pursuant to an order under section 4241, 4244, or 4245 [18 USCS § 4241, 4244, or 4245], the court may commit the person to be examined for a reasonable period, but not to exceed thirty days, and under section 4242, 4243, 4246, or 4248 [18 USCS § 4242, 4243, 4246, or 4248], for a reasonable period, but not to exceed forty-five days, to the custody of the Attorney General for placement in a suitable facility. Unless impracticable, the psychiatric or psychological examination shall be conducted in the suitable facility closest to the court. The director of the facility may apply for a reasonable extension, but not to exceed fifteen days under section 4241, 4244, or 4245 [18 USCS § 4241, 4244, or 4245], and not to exceed thirty days

under section 4242, 4243, 4246, or 4248 [18 USCS § 4242, 4243, 4246, or 4248], upon a showing of good cause that the additional time is necessary to observe and evaluate the defendant.

(c) Psychiatric or psychological reports. A psychiatric or psychological report ordered pursuant to this chapter shall be prepared by the examiner designated to conduct the psychiatric or psychological examination, shall be filed with the court with copies provided to the counsel for the person examined and to the attorney for the Government, and shall include--

(1) the person's history and present symptoms;

(2) a description of the psychiatric, psychological, and medical tests that were employed and their results;

(3) the examiner's findings; and

(4) the examiner's opinions as to diagnosis, prognosis, and--

(A) if the examination is ordered under section 4241 [18 USCS § 4241], whether the person is suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense;

(B) if the examination is ordered under section 4242 [18 USCS § 4242], whether the person was insane at the time of the offense charged;

(C) if the examination is ordered under section 4243 or 4246 [18 USCS § 4243 or 4246], whether the person is suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another;

(D) if the examination is ordered under section 4248 [18 USCS § 4248], whether the person is a sexually dangerous person;

(E) if the examination is ordered under section 4244 or 4245 [18 USCS § 4244 or 4245], whether the person is suffering from a mental disease or defect as a result of which he is in need of custody for care or treatment in a suitable facility; or

(F) if the examination is ordered as a part of a presentence investigation, any recommendation the examiner may have as to how the mental condition of the defendant should affect the sentence.

(d) Hearing. At a hearing ordered pursuant to this chapter [18 USCS §§ 4241 et seq.] the person whose mental condition is the subject of the hearing shall be represented by counsel and, if he is financially unable to obtain adequate representation, counsel shall be appointed for him pursuant to section 3006A [18 USCS § 3006A]. The person shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing.

(e) Periodic report and information requirements.

(1) The director of the facility in which a person is committed pursuant to--

(A) section 4241 [18 USCS § 4241] shall prepare semiannual reports; or

(B) section 4243, 4244, 4245, 4246, or 4248 [18 USCS § 4243, 4244, 4245, 4246, or 4248] shall prepare annual reports concerning the mental condition of the person and containing recommendations concerning the need for his continued commitment. The reports shall be submitted to the court that ordered the person's commitment to the facility and copies of the reports shall be submitted to such other persons as the court may direct. A copy of each such report concerning a person committed after the beginning of a prosecution of that person for violation of section 871,

879, or 1751 of this title [18 USCS § 871, 879, or 1751] shall be submitted to the Director of the United States Secret Service. Except with the prior approval of the court, the Secret Service shall not use or disclose the information in these copies for any purpose other than carrying out protective duties under section 3056(a) of this title [18 USCS § 3056(a)].

(2) The director of the facility in which a person is committed pursuant to section 4241, 4243, 4244, 4245, 4246, or 4248 [18 USCS § 4241, 4243, 4244, 4245, 4246, or 4248] shall inform such person of any rehabilitation programs that are available for persons committed in that facility.

(f) Videotape record. Upon written request of defense counsel, the court may order a videotape record made of the defendant's testimony or interview upon which the periodic report is based pursuant to subsection (e). Such videotape record shall be submitted to the court along with the periodic report.

(g) Habeas corpus unimpaired. Nothing contained in section 4243, 4246, or 4248 [18 USCS § 4243, 4246, or 4248] precludes a person who is committed under either of such sections from establishing by writ of habeas corpus the illegality of his detention.

(h) Discharge. Regardless of whether the director of the facility in which a person is committed has filed a certificate pursuant to the provisions of subsection (e) of section 4241, 4244, 4245, 4246, or 4248 [18 USCS § 4241, 4244, 4245, 4246, or 4248], or subsection (f) of section 4243 [18 USCS § 4243], counsel for the person or his legal guardian may, at any time during such person's commitment, file with the court that ordered the commitment a motion for a hearing to determine whether the person should be discharged from such facility, but no such motion may be filed within one hundred and eighty days of a court determination that the person should continue to be committed. A copy of the motion shall be sent to the director of the facility in which the person is committed and to the attorney for the Government.

(i) Authority and responsibility of the Attorney General. The Attorney General--

(A) may contract with a State, a political subdivision, a locality, or a private agency for the confinement, hospitalization, care, or treatment of, or the provision of services to, a person committed to his custody pursuant to this chapter [18 USCS §§ 4241 et seq.];

(B) may apply for the civil commitment, pursuant to State law, of a person committed to his custody pursuant to section 4243, 4246, or 4248 [18 USCS § 4243, 4246, or 4248];

(C) shall, before placing a person in a facility pursuant to the provisions of section 4241, 4243, 4244, 4245, 4246, or 4248 [18 USCS § 4241, 4243, 4244, 4245, 4246, or 4248], consider the suitability of the facility's rehabilitation programs in meeting the needs of the person; and

(D) shall consult with the Secretary of the Department of Health and Human Services in the general implementation of the provisions of this chapter [18 USCS §§ 4241 et seq.] and in the establishment of standards for facilities used in the implementation of this chapter [18 USCS §§ 4241 et seq.].

(j) Sections 4241, 4242, 4243, and 4244 [18 USCS §§ 4241, 4242, 4243, and 4244] do not apply to a prosecution under an Act of Congress applicable exclusively to the District of Columbia or the Uniform Code of Military Justice.

History:

(Added Sept. 7, 1949, ch 535, § 1, 63 Stat. 687; Oct. 12, 1984, P.L. 98-473, Title II, Ch IV, § 403(a), 98 Stat. 2065; Nov. 18, 1988, P.L. 100-690, Title VII, Subtitle B, §§ 7044, 7047(a), 102 Stat. 4400, 4401; Sept. 13, 1994, P.L. 103-322, Title XXXIII, § 330003(d), 108 Stat. 2141; Aug. 5, 1997, P.L. 105-33, Title XI, Subtitle C, Ch 1, § 11204(2), (3), 111 Stat. 739.)
(As amended July 27, 2006, P.L. 109-248, Title III, § 302(3), 120 Stat. 619.)

Amendments

2006. Act July 27, 2006, in subsec. (a), in para. (1), substituted subpara. (C) for one which read: "(C) drug, alcohol, and other treatment programs that will assist the individual in overcoming his psychological or physical dependence; and", in para. (2), deleted "and" following the concluding semicolon, in para. (3), substituted the concluding semicolon for a period, and added paras. (4)-(6); in subsec. (b), substituted "4245, 4246, or **4248**" for "4245 or 4246"; in subsec. (c)(4), redesignated subparas. (D) and (E) as subparas. (E) and (F), respectively, and inserted new subpara. (D); in subsec. (e), substituted "committed" for "hospitalized" wherever appearing, and, in para. (1)(B), substituted "continued commitment" for "continued hospitalization"; in subsec. (g), substituted "4243, 4246, or 4248" for "4243 or 4246"; in subsec. (h), substituted "committed" for "hospitalized" in three places, and substituted "person's commitment" for "person's hospitalization"; in subsec. (i)(B), substituted "4243, 4246, or **4248**" for "4243 or 4246"; and substituted ", 4246, or **4248**" for ", or 4246" wherever appearing.

Updated: 12/2006

18 U.S.C. § 4248. Civil Commitment of a Sexually Dangerous Person

(a) **Institution of proceedings.** In relation to a person who is in the custody of the Bureau of Prisons, or who has been committed to the custody of the Attorney General pursuant to section 4241(d) [*18 U.S.C. § 4241(d)*][[1]], or against whom all criminal charges have been dismissed solely for reasons relating to the mental condition of the person, the Attorney General or any individual authorized by the Attorney General or the Director of the Bureau of Prisons may certify that the person is a sexually dangerous person, and transmit the certificate to the clerk of the court for the district in which the person is confined. The clerk shall send a copy of the certificate to the person, and to the attorney for the Government, and, if the person was committed pursuant to section 4241(d) [*18 U.S.C. § 4241(d)*], to the clerk of the court that ordered the commitment. The court shall order a hearing to determine whether the person is a sexually dangerous person. A certificate filed under this subsection shall stay the release of the person pending completion of procedures contained in this section.

(b) **Psychiatric or psychological examination and report.** Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c) [*18 U.S.C. § 4247(b)* and (c)].

(c) **Hearing.** The hearing shall be conducted pursuant to the provisions of section 4247(d) [*18 U.S.C. § 4247(d)*].

(d) **Determination and disposition.** If, after the hearing, the court finds by clear and convincing evidence that the person is a sexually dangerous person, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment. The Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility. If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall place the person for treatment in a suitable facility, until--

(1) such a State will assume such responsibility; or

(2) the person's condition is such that he is no longer sexually dangerous to others, or will not be sexually dangerous to others if released under a prescribed regimen of medical, psychiatric, or psychological care or treatment; whichever is earlier.

(e) **Discharge.** When the Director of the facility in which a person is placed pursuant to subsection (d) determines that the person's condition is such that he is no longer sexually dangerous to others, or will not be sexually dangerous to others if released under a prescribed regimen of medical, psychiatric, or psychological care or treatment, he shall promptly file a certificate to that effect with the clerk of the court that ordered the

commitment. The clerk shall send a copy of the certificate to the person's counsel and to the attorney for the Government. The court shall order the discharge of the person or, on motion of the attorney for the Government or on its own motion, shall hold a hearing, conducted pursuant to the provisions of section 4247(d) [*18 U.S.C. § 4247(d)*][[2]], to determine whether he should be released. If, after the hearing, the court finds by a preponderance of the evidence that the person's condition is such that–

(1) he will not be sexually dangerous to others if released unconditionally, the court shall order that he be immediately discharged; or

(2) he will not be sexually dangerous to others if released under a prescribed regimen of medical, psychiatric, or psychological care or treatment, the court shall–

(A) order that he be conditionally discharged under a prescribed regimen of medical, psychiatric, or psychological care or treatment that has been prepared for him, that has been certified to the court as appropriate by the Director of the facility in which he is committed, and that has been found by the court to be appropriate; and

(B) order, as an explicit condition of release, that he comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment.

The court at any time may, after a hearing employing the same criteria, modify or eliminate the regimen of medical, psychiatric, or psychological care or treatment.

(f) **Revocation of conditional discharge.** The director of a facility responsible for administering a regimen imposed on a person conditionally discharged under subsection (e) shall notify the Attorney General and the court having jurisdiction over the person of any failure of the person to comply with the regimen. Upon such notice, or upon other probable cause to believe that the person has failed to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, the person may be arrested, and, upon arrest, shall be taken without unnecessary delay before the court having jurisdiction over him. The court shall, after a hearing, determine whether the person should be remanded to a suitable facility on the ground that he is sexually dangerous to others in light of his failure to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment.

(g) **Release to State of certain other persons.** If the director of the facility in which a person is hospitalized or placed pursuant to this chapter certifies to the Attorney General that a person, against whom all charges have been dismissed for reasons not related to the mental condition of the person, is a sexually dangerous person, the Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried for the purpose of institution of State proceedings for civil commitment. If neither such State will assume such responsibility, the Attorney General shall release the person upon receipt of notice from the State that it will not assume such responsibility, but not later than 10 days after certification by the director of the facility.

HISTORY: (Added July 27, 2006, P.L. 109-248, Title III, § 302(4), 120 Stat. 620.)

Notes:

1. **18 U.S.C. § 4241. Determination of mental competency to stand trial or to undergo post-release proceedings.**

(a) Motion to determine competency of defendant.
At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, or at any time after the commencement of probation or supervised release and prior to the completion of the sentence, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

(b) Psychiatric or psychological examination and report.
Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c) [18 U.S.C. § 4247(b) and (c)].

(c) Hearing.
The hearing shall be conducted pursuant to the provisions of section 4247(d) [18 U.S.C. § 4247(d)].

(d) Determination and disposition.
If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility--

(1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the proceedings to go forward; and

(2) for an additional reasonable period of time until--

(A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the proceedings to go forward; or

(B) the pending charges against him are disposed of according to law; whichever is earlier.

If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the proceedings to go forward, the defendant is subject to the provisions of sections 4246 and 4248 [18 U.S.C. §§ 4246 and 4248].

(e) Discharge.
When the director of the facility in which a defendant is hospitalized pursuant to subsection (d)

determines that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the Government. The court shall hold a hearing, conducted pursuant to the provisions of section 4247(d) [18 U.S.C. § 4247(d)], to determine the competency of the defendant. If, after the hearing, the court finds by a preponderance of the evidence that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, the court shall order his immediate discharge from the facility in which he is hospitalized and shall set the date for trial or other proceedings. Upon discharge, the defendant is subject to the provisions of chapters 207 and 227 [18 U.S.C. §§ 3141 et seq. and 3551 et seq.].

(f) Admissibility of finding of competency. A finding by the court that the defendant is mentally competent to stand trial shall not prejudice the defendant in raising the issue of his insanity as a defense to the offense charged, and shall not be admissible as evidence in a trial for the offense charged.

2. **18 U.S.C. 4247(d) Hearing.**

At a hearing ordered pursuant to this chapter [18 USC §§ 4241 et seq.] the person whose mental condition is the subject of the hearing shall be represented by counsel and, if he is financially unable to obtain adequate representation, counsel shall be appointed for him pursuant to section 3006A [18 USC § 3006A]. The person shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

ISMAEL TABLADA,

Petitioner,

vs.

CHARLES A. DANIELS, Warden, FCI Sheridan,

Respondent.

Civ. No. 06-762-MO

PRELIMINARY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

Full text of the brief available at
http://or.fd.org/TabladaMemoranduminSupport.pdf

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