GAO Report Reveals Multiple Ways To End The Waste Of Millions On Unnecessary Over-Incarceration

Report on Behalf of the Federal Public and Community Defenders

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April 4, 2012

FACT SHEET: GAO REPORT REVEALS THE BOP'S UNDERUTILIZATION OF COST-SAVING PROGRAMS

The Government Accountability Office (GAO) has performed an important service in its study on the Bureau of Prisons' ability to reduce incarceration costs. The report can be used as a starting point for identifying ways to reduce prison over-crowding, reduce the risk of future recidivism, and save millions of taxpayer dollars every year. The BOP's underutilization of available programs that would reduce over-incarceration and future recidivism falls into several general categories.

First, the GAO identified three statutory programs that, if fully implemented, would save taxpayer dollars that are now being wasted on unnecessary incarceration:

- The BOP underutilizes the residential drug abuse program (RDAP) incentive for nonviolent offenders. If inmates had received the full 12-month reduction from 2009 to 2011, the BOP would have saved up to $144 million. Much more would be saved if all statutorily eligible prisoners were allowed to participate.

- The BOP underutilizes available community corrections so that inmates serve an average of only 4 months of the available 12 months authorized by the Second Chance Act. Just by increasing home confinement by three months, the BOP could save up to $111.4 million each year.

- The BOP underutilizes available sentence modification authority for "extraordinary and compelling reasons," depriving sentencing judges of the opportunity to reduce over-incarceration of deserving prisoners whose continued imprisonment involves some of the highest prison costs.

Second, the GAO confirmed that amending the good time credit statute to require that inmates serve no more than 85% of the sentence would better calibrate actual time served with the assumptions underlying the sentencing guidelines consulted at sentencing. Both the Department of Justice and the BOP favor the amendment. After the release of about 3,900 inmates in the first fiscal year, the BOP would continue to save about $40 million a year once the amendment was enacted.

Third, the GAO identifies cost savings that the BOP could realize simply by using available rules for executing and calculating sentences. For example, the BOP unilaterally abolished the shock incarceration program, spending unnecessary millions by replacing sentence reductions and increased home detention with prison time for nonviolent offenders with minimal criminal history. The BOP also fails to treat defendants' time in immigration custody as "official detention," an unnecessary policy that increases custody costs by creating dead time. The BOP should act immediately to end these and other unnecessary and wasteful policies.

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April 4, 2012

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Bobby Scott
Ranking Member
Subcommittee on Crime, Terrorism, and Homeland Security
Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20510

Re: Response to GAO Report on BOP Underutilization of Statutory Authority To Reduce Prison Over-Crowding and Incarceration Costs

Dear Senator Leahy and Congressman Scott:

Thank you for your request for our comments on the Government Accountability Office's February 2012 report on the Bureau of Prisons' authority to reduce inmates' time in prison.[1] The GAO report can be used as a starting point to identify the numerous areas in which the BOP is systematically underutilizing available programs under statutes Congress enacted. If the BOP fully implemented the programs, it would reduce prison overcrowding and save millions in taxpayer dollars each year. By implementing – and in some cases expanding – available programs, and in a few instances by securing new authority through legislative changes, the BOP can achieve major cost savings not only without compromising public safety, but increasing public safety by reducing the risk of future recidivism and by reducing overcrowding of federal prisons that are operating at 137% of capacity.

You charged the GAO to determine two things:

[1] Government Accountability Office, Bureau of Prisons: Eligibility and Capacity Impact Use of Flexibilities to Reduce Inmates' Time in Prison (Feb. 2012).

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1. To what extent does the BOP utilize its authorities to reduce a federal prisoner's period of incarceration; and
2. What factors, if any, impact the BOP's use of these authorities?

The GAO analyzed statutes, BOP policies, program statements and guidance, conducted interviews and site visits, and obtained and analyzed data and research, including costs and projections. It also interviewed subject matter experts and reviewed literature.

The GAO identified the universe of BOP discretionary authority available to reduce time in custody:

- Residential Drug Abuse Program (RDAP) – 18 U.S.C. § 3621(e)
- Residential Reentry and Home Detention – 18 U.S.C. § 3624(c)
- Good Conduct Time (GCT) – 18 U.S.C. § 3624(b)
- Modification of an Imposed Sentence – 18 U.S.C. § 3582(c)
- Shock Incarceration Program – 18 U.S.C. § 4046
- Elderly Offender Pilot Program – 42 U.S.C. § 17541(g)
- Sentence Computation Authority to Allow Concurrent Service of State and Federal Sentences – 18 U.S.C. § 3584
- Credit for Time Served in Custody – 18 U.S.C. § 3585(b)

The GAO highlighted a number of statutory authorities that, if fully utilized, could save hundreds of millions of dollars a year that are now being wasted on unnecessary incarceration. Below we describe each area in which the GAO found that the BOP is underutilizing its authority to reduce sentences, suggest potential solutions, and estimate the cost savings. For solutions that involve only administrative action, the BOP should promptly implement the solutions as a condition of receiving increased appropriations. For the few solutions that would require legislative action, Congress should act as soon as practicable to provide the BOP with the ability to reduce expenditures.

The following is an outline of the principle areas in which the BOP is either underutilizing available statutes or should be provided further authority to reduce over-incarceration. The changes recommended here would not only reduce time spent in federal prison and save hundreds of millions of taxpayer dollars, but they would also result in policies that better serve the goal of reducing the risk of future reoffending and its attendant social and institutional costs.

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A. The BOP Should Fully Implement the RDAP Sentence Reduction and Make the Incentive Applicable to All Statutorily Eligible Inmates.

In 1990, Congress created the in-prison residential substance abuse treatment program (RDAP) to address two leading causes of recidivism – alcoholism and drug addiction. When very few prisoners volunteered for the program, Congress in 1994 enacted an incentive of a sentence reduction of up to one year for successful completion of the program, which resulted in greatly increased participation.[2] The reduction is available only to prisoners convicted of a nonviolent offense.

According to a rigorous study conducted by the BOP in coordination with the National Institute on Drug Abuse, RDAP is extremely effective in providing prisoners the tools to return to their communities and to live law-abiding, sober lives.[3] While RDAP itself reduces recidivism, earlier release into the community also promotes reduced recidivism because it allows prisoners to return to work sooner, to strengthen family ties,[4] and to remove themselves from the criminogenic effects of imprisonment.[5] In short, the more inmates who participate in the program and the sooner they are released, the better.

However, the GAO reports that only a fraction of the inmates who successfully complete the RDAP program receive the full 12-month sentence reduction allowed by statute, and some do not receive any reduction at all. GAO Report at 13. The GAO reports that only 19% of inmates

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[2] 18 U.S.C. § 3621(e)(2); 74 Fed. Reg. 1892, 1893 (Jan. 14, 2009) ("[T[he early release is [] a powerful incentive, as evidenced by over 7000 inmates waiting to enter treatment . . . .").

[3] Federal Bureau of Prisons, *Annual Report on Substance Abuse Treatment Programs Fiscal Year 2011: Report to the House Judiciary Committee* 8 (2011) (prisoners who complete the RDAP are 16 percent less likely to recidivate and 15 percent less likely to relapse to drug use within three years after release); *accord* Federal Bureau of Prisons, *Federal Prison Residential Drug Treatment Reduces Substance Use and Arrests After Release* (2007).

[4] The Sentencing Commission's research and substantial other research demonstrates that employment and family ties and responsibilities predict reduced recidivism. U.S. Sent'g Comm'n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 12-13 & Ex. 10 (2004); U.S. Sent'g Comm'n, *Recidivism and the "First Offender"* 8 (2004); Miles D. Harer, Federal Bureau of Prisons, Office of Research and Evaluation, *Recidivism Among Federal Prisoners Released in 1987*, at 4-6, 54 (1994), http://www.bop.gov/news/research_projects/published_reports/recidivism/oreprrecid87.pdf; USSC, *Symposium on Alternatives to Incarceration* 22-24 (testimony of Chief Probation Officer Doug Burris, E.D. Mo.) (employment program reduced recidivism by 33%); *see also id.* at 238-39 (testimony of Judge Jackson, E.D. Mo.); Shirley R. Klein *et al.*, *Inmate Family Functioning*, 46 Int'l J. Offender Therapy & Comp. Criminology 95, 99-100 (2002) ("The relationship between family ties and lower recidivism has been consistent across study populations, different periods, and different methodological procedures."); Phyllis J. Newton, Jill Glazer, & Kevin Blackwell, *Gender, Individuality and the Federal Sentencing Guidelines*, 8 Fed. Sent'g Rep. 148 (1995) ("[T]he better family ties are maintained[,] the lower the recidivism rate," and "children left without parents burden society.");

[5] *See* U.S. Sent'g Comm'n, Staff Discussion Paper, *Sentencing Options Under the Guidelines* (1996) (recognizing the "criminogenic effects of imprisonment which include contact with more serious offenders, disruption of legal employment, and weakening of family ties").

who successfully completed the program in fiscal years 2009 to 2011 received the maximum reduction available under BOP policy, and 1% did not receive any reduction at all. GAO Report at 13. The average reduction was only 8 months. GAO Report at 14. While the GAO noted that BOP policy limits the amount of reduction by sentence length,[6] this cap is not required by statute. Thus, the percentage of inmates who received the full 12 months as allowed *by statute* was actually less than 19%.[7]

Moreover, contrary to BOP's description of "eligible" inmates, GAO Report at 13, the BOP categorically bars entire categories of prisoners from receiving the reduction even though they are otherwise statutorily eligible to receive it. The BOP does not permit inmates with detainers to participate in RDAP. It also categorically excludes inmates who were not convicted of a violent offense, but rather were drug offenders whose federal sentencing guideline level was increased because a weapon "was possessed," or who were previously convicted of a minor violent offense, no matter how long ago.

RECOMMENDATIONS

- The BOP should take the steps necessary to ensure that all inmates who successfully complete RDAP receive the full 12-month reduction, regardless of sentence length. This would save over $45 million a year in prison costs alone, with additional societal savings realized through reduced recidivism, better employment prospects, and stronger family ties.

- The BOP should rescind its categorical rule excluding inmates with detainers from participating in RDAP. This would save *at least* another $25 million a year, likely much more.

- The BOP should rescind its categorical rules excluding (1) inmates convicted of possession of a firearm and those convicted of a drug offense who received an enhancement under the guidelines because a weapon "was possessed" and (2) inmates previously convicted of an offense involving violence, no matter how minor or how old. This would save many more millions in prison costs, and would likely result in similar rates of reduced recidivism and increased societal benefits.

Each of these recommendations is explained in more detail below.

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[6] BOP Program Statement 5331.02, § 10 (Mar. 16, 2009) (an inmate serving a sentence of 30 months or less may receive a reduction of no more than 6 months, and an inmate serving a sentence of 31-36, no more than 9 months).

[7] The exact figure cannot be ascertained from the numbers reported by the GAO or through other sources.

1. Unnecessary delay resulting in inmates not receiving the full 12-month reduction

The GAO reports that "[w]hile eligible prisoners can participate in RDAP in time to complete the program, few receive the maximum sentence reduction." GAO Report at 10. According to the BOP, the reason the average reduction was only eight months, rather than the full 12 months available under § 3621(e), is that "by the time they complete RDAP, they have fewer months remaining on their sentences than the maximum allowable reduction." GAO Report at 14. While current BOP policy recommends that an inmate's eligibility screening process begin no less than 24 months before the inmate's projected release date, "some inmates may have to wait for clinical interviews, for program slots to open, or both." GAO Report at 14. The BOP explained that as a result of these system-wide delays and limited program slots, there is a significant backlog of inmates on long waitlists, preventing some inmates from participating in the program soon enough to receive the maximum sentence reduction, or from participating at all. GAO Report at 14, 34. Further, while those on the waitlists are prioritized by projected release date, BOP chooses not to include the potential sentence reduction in the projected release date for nonviolent offenders eligible for the sentence reduction. GAO Report at 34. As a result, inmates enter the program too late to receive the maximum reduction allowed. These policies and practices result in significant underutilization of the sentence reduction authorized by 18 U.S.C. § 3621(e).

In the past, the BOP made eligibility determinations whenever a prisoner made a request,[8] but the BOP now delays eligibility determinations, resulting in applications and eligibility interviews late in a prisoner's term of imprisonment. Early determinations of eligibility would allow the BOP sufficient time to plan to send prisoners to facilities with room in their programs, avoiding the queues for eligibility determinations noted by the GAO.

These delays are exacerbated by the BOP's omission of the potential RDAP sentence reduction for nonviolent offenders in calculating projected release date. The BOP acknowledges it could change this practice and include the potential RDAP sentence reduction in the projected release date in order to ensure that those eligible would "enter the program sooner and in enough time to receive the maximum reduction." GAO Report at 34. But doing so, it says, would prevent some inmates – those who are eligible for RDAP but not eligible for a sentence reduction – from participating in the program by being continually displaced on the list by those eligible for the reduction. GAO Report at 34. The BOP says that the statute prevents it from displacing anyone determined to be in need of treatment. However, when asked by GAO for documentation that eligible prisoners would be displaced, BOP was unable to provide any. GAO Report at 35.

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[8] BOP Program Statement 5330.10 (May 25, 1995); *Wade v. Daniels*, 373 F. Supp. 2d 1201, 1204 (D. Or. 2005) (relying on the BOP's 1995 policy, which required it to evaluate early release eligibility at the time of the inmate's request to enter the program).

Failure to prioritize offenders eligible for the reduction in sentence – as the BOP did for the first decade of the program – unnecessarily delays entry of prisoners eligible for the incentive and significantly shortens the awarded sentence reduction. It is also contrary to the congressional directive that the BOP "prioritize the participation of nonviolent offenders in the Residential Drug Abuse Treatment Program (RDAP) in a way that maximizes the benefit of sentence reduction opportunities for reducing the inmate population."[9] Though the BOP's methodology has been upheld as a valid administrative interpretation of the statute, at least one circuit court has recognized that the "BOP's administration of RDAP, combined with the program's insufficient capacity, has created a troubling situation that calls for a legislative or regulatory remedy."[10] The former BOP Director has also called for "the full 12 months allowed by statute."[11]

The BOP should determine whether, by allowing inmates with detainers to participate in RDAP, other statutorily eligible inmates would in fact be displaced. At the very least, the BOP should return to its old rule and alter the timing of its eligibility screening and prioritize its waitlists so that those inmates eligible for a sentence reduction receive the maximum available reduction.

If the BOP fully implemented the sentence reduction in these simple ways, savings would be substantial. In fiscal years 2009 through 2011, 15,302 inmates successfully completed the program and were eligible for the sentence reduction. GAO Report at 13. These inmates received an average sentence reduction of eight months, whereas the maximum available reduction was 11.6 months.[12] With the annual cost of imprisonment at $28,284, the BOP would have saved $144,267,256 – over $45 million a year – by providing nonviolent offenders the maximum sentence reduction for successful completion of the program.[13]

2. Categorical exclusion of statutorily eligible inmates with detainers

The GAO relies on the BOP's 2009 and 2010 annual reports to Congress for the statement that "during fiscal years 2009 and 2010 all eligible inmates who expressed interest in

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[9] Departments of Transportation and Housing and Urban Development, and Related Agencies Appropriations Act, 2010: Conference Report to Accompany H.R. 3288, H.R. Rep. No. 111-366, at 673 (2009), *reprinted in* 2010 U.S.C.C.A.N. 1105, 1181.

[10] *Close v. Thomas*, 653 F.3d 970, 976 (9th Cir. 2011).

[11] *Commerce, Justice, Science, and Related Agencies Appropriations for 2012: Hearings Before the Subcomm. on Commerce, Justice, Science, and Related Agencies of the H. Comm. on Appropriations*, 112th Cong. 369 (2011) (Statement of Harley G. Lappin, Director, Federal Bureau of Prisons).

[12] The maximum average reduction would be 11.6 months rather than 12 months because a small number of inmates who completed the program were eligible for a reduction of only 6 or 9 months due to the length of their sentences as result of a change in BOP's rules in 2009. GAO Report at 14 n.21.

[13] This is the product of the number of qualifying inmates, times 1/3 for the average four months lost, times the average annual cost of incarceration. *See Annual Determination of Average Cost of Incarceration*, 76 Fed. Reg. 57,081 (Sept. 15, 2011) (annual cost of incarceration is $28,284 in fiscal year 2010).

RDAP were able to participate in the program in time to complete it before their release from BOP custody." GAO Report at 13. In fact, however, BOP does not allow all statutorily "eligible prisoners" to participate in RDAP. In 2009, the BOP declared for the first time that statutorily "eligible prisoners" with detainers could no longer participate in residential drug treatment at all, significantly narrowing the class of inmates deemed "eligible" by the BOP and thereby making it appear as though the BOP is closer to fulfilling its statutory mandate than it really is.

In 1994, Congress required that, by 1997, the BOP shall "provide residential substance abuse treatment" to "all eligible prisoners."[14] Congress defined "eligible prisoner" as a person with a substance abuse problem who is "willing to participate in a residential substance abuse treatment program."[15] Congress did not require as a condition of participation in residential treatment that the prisoner must also be able to participate in community corrections. As initially promulgated in 1995, the BOP's rules specifically provided for early release eligibility for all persons who successfully completed the residential program and then succeeded in *either* community corrections *or* transitional programming within the institution.[16] This meant that nonviolent United States citizens with state detainers and nonviolent aliens with immigration detainers could receive treatment and a sentence reduction upon successful completion of the program.

This sensible policy has been disrupted by two ill-considered decisions. In 1995, the American Psychiatric Association wrote to the BOP suggesting that, for better outcomes, inmates should receive more than the proposed minimum of one hour per month of institutional transitional treatment.[17] In response, the BOP acknowledged that it may be able to increase the availability of transitional services at an institution, but said "it cannot duplicate . . . the environment of community-based transitional services."[18] It then promulgated a new rule that only those inmates who complete transitional services in a halfway house or while on home detention could be considered for the sentence reduction.[19] As a result, prisoners with detainers were ineligible for the sentence reduction, but could still participate in residential treatment.[20]

In June 2000, the American Psychiatric Association reacted with alarm when it realized that its comment had been used to justify denying the sentence reduction for a sizeable portion of the federal prison population – those with detainers. It provided a new comment to the BOP

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[14] 18 U.S.C. § 3621(e)(1)(C).
[15] 18 U.S.C. § 3621(e)(5)(B).
[16] BOP Program Statement 5330.10, ch. 6, at 2 (May 25, 1995) (repealed 2009); *see* 28 C.F.R. § 550.56 (1995).
[17] Letter from Melvin Shabsin, M.D., Medical Director, American Psychiatric Association, to Kathleen Hawk, Director, Bureau of Prisons (July 18, 1995), available at http://or.fd.org/Alternatives%20to%20 Incarceration/Page%2010.pdf.
[18] 61 Fed. Reg. 25,121 (May 17, 1996) (amending 28 C.F.R. § 550.58).
[19] *Id.*
[20] *Id.*

objecting to the misuse of its 1995 comment and explaining that "transitional services can be established within a prison setting that can improve the outcome related to successful completion of a residential drug treatment program" and that this can be accomplished by "increasing the minimum requirement for transitional services within the institution from the original minimum of one hour per month."[21] The Association explained that it did not "mean to present an either/or choice of one hour per month within the institution or full participation in the community-based program."[22] The BOP did not modify its position.

In 2009, the BOP altered the RDAP participation criteria to completely exclude from residential treatment all prisoners with detainers or outstanding charges, regardless of their status as "eligible prisoners" within the meaning of statute. It accomplished this in a roundabout way by promulgating a rule stating that in order to participate in RDAP, inmates must be able to complete the residential re-entry (RRC) component of the program.[23] Because inmates with detainers are ineligible for placement in RRCs, they are ineligible to even participate in RDAP. GAO Report at 30-32.[24]

As a result, a significant proportion of inmates are excluded from participating in RDAP. Based on its analysis of BOP data, the GAO reports that 24,436 inmates in 2011, or approximately 11.3%, were ineligible for placement in a RRC in 2011 due to a detainer. GAO Report at 1, 31. But even this number may not fully reflect the actual number of inmates with detainers. According to BOP statistics, 26.7% of inmates are non-citizens.[25] Nearly half of defendants sentenced in fiscal year 2010, over 40,000, were non-citizens.[26] It is safe to say that most were convicted of a deportable offense and therefore have an immigration detainer. Notably, the number of inmates with detainers steadily *increased* each year in the three years examined by the GAO.

Whatever the actual number of inmates with detainers, BOP officials recognize that its policy deeming inmates with detainers ineligible for placement in RRCs is a "chief reason" that RDAP is underutilized. GAO Report at 30. BOP itself estimates that 2,500 aliens would participate in RDAP each year if it changed this policy, which it says would save $25 million per

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[21] Letter from Steven M. Mirin, M.D., Medical Director, American Psychiatric Association, to Kathleen M. Hawk Sawyer, Director, Bureau of Prisons, at 2 (June 21, 2000); *see also* Drug Abuse Treatment and Intensive Confinement Programs: Early Release Consideration, 65 Fed. Reg. 80,745, 80,746-47 (Dec. 22, 2000) (describing the Association's letter and adopting 1996 interim rule as final).
[22] *Id*. at 80,747.
[23] 28 C.F.R. § 550.53 (b)(3) (effective Mar. 16, 2009).
[24] *See* BOP Program Statement 5531.02 (Mar. 16, 2009) (Early Release Procedures Under 18 U.S.C. § 3621(e)). "According to BOP," the GAO reports, "inmates with detainers are deemed inappropriate for placement in community corrections due to the increased risk of escape and for those with immigration detainers, the likelihood of deportation." GAO Report at 30.
[25] *See* Quick Facts About the Bureau of Prisons, http://www.bop.gov/news/quick.jsp#2, last visited Mar. 29, 2012.
[26] U.S. Sent'g Comm'n, 2011 Sourcebook of Federal Sentencing Statistics, tbl. 9 (2011) (48% non-citizens).

year. GAO Report at 32 & n.63. This figure no doubt underestimates the actual savings because it is based on the BOP's policy of limiting the sentence reduction based on sentence length, as explained above, and its discretionary rules excluding inmates based on prior convictions and guideline enhancements, which are not required by statute, as explained below.

BOP told the GAO that transitional treatment within an institution is "ineffective because the inmate remains sheltered from the partial freedoms and outside pressures experienced during an RRC placement," GAO Report at 32, but the GAO does not appear to have verified this statement. In fact, when the BOP changed its rule in 2009, it said nothing about transitional treatment being "ineffective." [27] Indeed, the American Psychiatric Association specifically clarified that transitional treatment within an institution "will result in better outcomes than no participation in such treatment."[28]

Tellingly, and despite its purported reasons for denying eligibility to inmates with detainers, the BOP is considering changing this policy and allowing those with detainers to complete RDAP without the RRC component and receive the sentence reduction. GAO Report at 32. If the BOP allowed nonviolent offenders to complete the transition portion of the sentence in prison, as it did in 1995, a large population of persons who pose the least risk to public safety – nonviolent offenders who will be immediately deported upon completion of their sentences – would be eligible for release twelve months earlier, saving at least $25 million of unnecessary incarceration a year, and likely much more. The BOP should act forthwith on restoring the sentence reduction for prisoners with detainers.

3. Unnecessary categorical bars on sentence reductions for other inmates convicted of a nonviolent offense

By statute, all inmates convicted of a "nonviolent" offense and who have been identified as having a substance abuse disorder are eligible to participate in RDAP. The BOP has exercised its discretion to categorically bar from receiving the sentence reduction prisoners who were convicted of mere possession of a firearm and those convicted of drug trafficking who receive a two-level increase under the Sentencing Guidelines because a gun "was possessed." The BOP also excludes prisoners convicted of a nonviolent offense who have prior violent convictions, regardless how old.[29] The BOP does not appear to have engaged in rigorous data-

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[27] *See* 74 Fed. Reg. 1892 (Jan. 14, 2009) (explanation and promulgation of final rule).

[28] Letter from Melvin Shabsin, M.D., Medical Director, American Psychiatric Association, to Kathleen Hawk, Director, Bureau of Prisons, at 2 (July 18, 1995).

[29] Drug Abuse Treatment and Intensive Confinement Center Programs: Early Release Consideration, 62 Fed. Reg. 53, 690 (Oct. 15, 1997); BOP Program Statement 5330.10 (Oct. 7, 1997); Drug Abuse Treatment and Intensive Confinement Center Programs: Early Release Consideration, 65 Fed. Reg. 80,745 (Dec. 22, 2000); 28 C.F.R. § 550.55(b) (Mar. 16, 2009); BOP Program Statement 5531.02 (Mar. 16, 2009) (Early Release Procedures Under 18 U.S.C. § 3621(e)); BOP Program Statement 5162.05, § 4(b) (Mar. 16, 2009) (Categorization of Offenses).

based rulemaking in creating these exclusions of otherwise statutorily eligible nonviolent offenders.

In contrast, the Sentencing Commission excludes possession of a firearm by a felon from the category of offenses that are deemed "crimes of violence."[30] It also excludes, for purposes of calculating criminal history, convictions that are ten or fifteen years old, relying on the Parole Commission's validated, empirical data demonstrating that certain sentences over ten years old should not count for criminal history points because they do not contribute to predicting the risk of re-offending.[31] It has also determined that old prior convictions for actual crimes of violence do not in fact predict future recidivism.[32] Thus, there is no apparent reason why the BOP should exclude nonviolent offenders with prior convictions that do not even count at sentencing and do not predict future recidivism. As a result of litigation in one circuit, hundreds of prisoners in those categories have successfully participated in the program and re-entered the community earlier than they otherwise would have.[33] But those who have not succeeded in such challenges remain excluded.

The BOP should critically examine the rationale for these exclusions by considering (1) the data on recidivism and relapse for excluded prisoners compared with those who receive the sentence reduction; (2) the reduction in overcrowding and cost savings that would be realized by including additional statutorily eligible prisoners; and (3) cost savings realized by reducing the risk of re-offending through the RDAP program. Comparing recidivism rates may reveal that those who fall in these categories but who nevertheless received treatment and a sentence reduction (such as those in the Ninth Circuit) have the same or similar reduced rate of recidivism as everyone else who participates in RDAP. In other words, those convicted of mere possession of a firearm or who received the two-level enhancement under the drug guideline because a weapon "was possessed" or whose prior convictions are so old they do not count for criminal history purposes at sentencing do not in fact pose a significantly greater risk to public safety when released early after successfully completing the RDAP program. Indeed, the Sentencing Commission recently debunked dire predictions that the early release of thousands of inmates convicted of crack offenses as a result of the 2007 guideline amendment would cause serious public safety problems. In fact, recidivism rates were not statistically different for crack

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[30] U.S. Sent'g Guidelines Manual § 4B1.2 cmt. (n.1).

[31] *Id.* § 4A1.2(e); U.S. Sent'g Comm'n, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* 3-4 (2005).

[32] U.S. Sent'g Comm'n, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* 1, 11 (2005).

[33] For example, in the Ninth Circuit, the BOP has provided the RDAP sentence reduction to inmates pursuant to Circuit-wide operations memorandums in response to the abrogation of the 1995 Program Statements, *see Downey v. Crabtree*, 100 F.3d 662 (9th Cir. 1996); *Davis v. Crabtree*, 109 F.3d 566 (9th Cir. 1997), the 1997 regulation, *see Paulsen v. Daniels*, 413 F.3d 999 (9th Cir. 2005), and the 2000 final rule, *see Arrington v. Daniels*, 516 F.3d 1106 (9th Cir. 2008); *Crickon v. Thomas*, 579 F.3d 978 (9th Cir. 2009). The validity of the 2009 version of the rule, which was implemented without empirical study or other data-based support, is pending before the Ninth Circuit in *Peck v. Thomas*, No. 11-35283.

offenders who were released early and those who were not, even for those "with weapon involvement."[34]

Even without entirely eliminating these categorical exclusions, the BOP could save millions of taxpayer dollars just by narrowing them. There is no apparent reason why a person with a nonviolent conviction *must* be eliminated from the program for possession of a hunting rifle, or for pawning a firearm, or for having a bullet without a gun. Nor is it clear why very old convictions involving violence *must* exclude an inmate from participating in RDAP. As shown above, these categorical exclusions are not required by statute and are not linked to increased risk of reoffending. They also discourage inmates from completing a program shown to *reduce* recidivism. Instead, the BOP should presumptively permit individuals falling in these categories to participate in RDAP, but may exclude an individual determined to be too great a risk based on an individualized assessment.

B. The BOP Should Fully Implement The Second Chance Act's Provision for Up to Twelve Months of Pre-Release Community Corrections Under 18 U.S.C. § 3624(a).

The GAO found that the BOP "refers eligible prisoners to community corrections, but has not assessed home detention to determine potential cost savings." GAO Report at 15. While the BOP does refer some eligible prisoners to community corrections, the GAO report makes clear that the BOP significantly underutilizes community corrections, costing hundreds of millions of taxpayer dollars and denying inmates the opportunity to improve their chances for successful reentry. According to its analysis of BOP data, the BOP permits prisoners eligible for community corrections an average of only *four* of the twelve months available under the Second Chance Act.

As the GAO notes, the Second Chance Act of 2007 doubled the amount of time – from six to twelve months – that an inmate may serve in pre-release community corrections at the end of the sentence. GAO Report at 15 n.24. But the BOP has not promulgated regulations, as Congress required, to effectuate this increase.[35] As reflected in the attached comment by the Federal Defenders, the BOP has instead relied on an informal internal policy limiting community corrections placement to six months, which essentially maintains the pre-Second Chance Act policies that sharply limited community corrections. Attachment A. Indeed, the GAO found that of the 29,000 prisoners transferred to community corrections in 2010, over 60% were placed in halfway houses only and served an average of just over three months. GAO Report at 16-17. The remainder received a combination of halfway house followed by home detention, serving together an average of just over five months, or received home detention only, serving an average less than four months. GAO Report at 17. While inmates generally may serve up to six

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[34] *See* U.S. Sent'g Comm'n, *Memorandum: Recidivism Among Offenders With Sentence Modifications Made Pursuant To Retroactive Application of 2007 Crack Cocaine Amendment* 10 (May 31, 2011). (comparing recidivism rates for crack offenders "with weapon involvement" and those without, and finding no statistically significant difference).

[35] 18 U.S.C. § 3624(c)(6).

months of home detention,[36] only a tiny fraction serve that long, with the average time served just over three months. GAO Report at 16-17. Overall, inmates serve an average of less than four months in community corrections. GAO Report at 17.

RECOMMENDATIONS

- The BOP should abandon the informal six-month limitation on community corrections and promulgate a regulation that includes a presumption of maximum available community corrections, limited only by considerations of individualized risk and resources.

- To maximize the duration of community confinement, the BOP should include as part of this new regulation a description of studies and analyses it considered in arriving at criteria for the exercise of individualized discretion.

- The BOP should direct earlier placement of inmates in RRCs to maximize the ensuing home confinement component of community corrections.

- To maximize savings, the BOP should follow its policy to ensure that more higher-security inmates are placed in RRCs, and more minimum-security inmates are placed directly to home-confinement and for longer periods.

Contrary to the BOP's suggestion, adopting these changes would save hundreds of millions of dollars, assuming the BOP follows its own policies regarding priority of placement in RRCs. The BOP told the GAO that "housing inmates in community correction was more costly, on a *per diem* basis, than housing inmates in minimum- and low-security facilities." GAO Report at 18. Using BOP data, the GAO found that the daily cost of housing an inmate in "community corrections" is $70.79, while it costs $69.53 and $57.56 to house inmates in a minimum- or low-security facility, respectively. GAO Report 18-19. But the term "community corrections" as used here by the GAO refers only to placement in an RRC, which costs $70.79 per day. GAO Report at 18, 20. As the GAO noted, the BOP recognizes that higher security inmates "are more likely to benefit from RRC placement" in terms of reduced recidivism, and since 2010 has recommended that staff prioritize those most likely to benefit, *i.e.* higher security inmates, for placement in RRCs. GAO Report at 17. In other words, the BOP's policy is to reserve for RRC placement those higher security inmates who would benefit most from it in terms of reduced recidivism, and for these inmates, RRC placement costs *less* than incarceration. GAO Report at 19.

[36] Home confinement is available for six months for sentences of 60 months or more and for 10% of sentences of less than 60 months. 18 U.S.C. § 3624(c)(2).

At the same time, while the BOP has not ascertained the actual costs of home detention, it told the GAO that it pays contractors 50% of the per diem rate for RRC placement, GAO Report at 20, which, at the average rate of $70.79 for RRC placement, is $35.39 per day. BOP data suggests that most of the inmates placed directly to home detention are minimum- and low-security inmates, *see* GAO Report at 18 & n.30, which means that the current cost of home detention should be significantly *less* than incarceration. Assuming the BOP pays the contractor $ 35.39 per day, six months in home detention for a minimum-security inmate costs $6,370, while housing that same inmate in an institution for six months costs $10,359, a difference of nearly $4,000. GAO Report at 18 & fig.3. The BOP also recognizes that if it increased the number of minimum-security inmates placed directly in home detention, more higher security inmates could be placed in RRCs. GAO Report at 18. Both actions would cost *less* than incarceration.

The GAO indicated that it was unable to accurately weigh the costs and benefits of supervising inmates in home detention and recommended that the BOP obtain information regarding the actual costs of home detention. GAO Report at 36. But some information regarding potential savings is already available. In a 2011 memorandum, the Administrative Office estimated the average yearly cost of supervision by probation officers at $3,938, or $10.79 per day,[37] which necessarily includes supervising those on home detention. If the BOP paid RRC contractors $10.79 a day for home detention, the BOP could save up to $58.8 million a year by increasing average home detention by just one month,[38] while increasing the average home detention by three months would save about $176.5 million a year. Even under the current presumptive rate paid by BOP for home detention (50% the RRC per diem rate), if the BOP were to increase the home detention component of community corrections by an average of just three months, it would save up to $111.4 million every year.[39]

C. Changes to the BOP's Treatment of Good Time Credit Would Save Hundreds of Millions of Dollars.

A number of changes to the BOP's approach to good time credit under 18 U.S.C. § 3624(b) would save hundreds of millions of taxpayer dollars.

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[37] Administrative Office, Memorandum from Matthew Rowland to Chief Probation Officers, *Cost of Incarceration and Supervision* (June 3, 2011).

[38] The monthly cost of imprisonment is $2357 (1/12 of the $28,284 annual costs); the monthly cost of home confinement is about $328 (1/12 of the $3,938 yearly cost of supervision by probation officers). The difference between them is $2,029 per month. Multiplying that difference by 29,000, the number of prisoners released in 2010 to community corrections, equals $58,841,000.

[39] The monthly cost of imprisonment is $2357 (1/12 of the $28,284 annual costs); the monthly cost of home confinement is about $1076 ($35.39 multiplied by 365 and divided by 12). The difference between them is $1,281 per month. Multiplying that difference by 29,000, the number of prisoners released in 2010 to community corrections, equals $37,149,000.

RECOMMENDATIONS

- Congress should pass the legislation proposed by the BOP so that the full 54 days of good time credit will be awarded for each year of imprisonment imposed. This change would save approximately $40 million in the first year alone.

- The BOP should assure that an inmate's disability, which may impair his ability to participate in educational classes or complete the 240-hour general education program, does not result in a loss of good time credit and unnecessary costs of extended incarceration.

- The BOP should change its methodology for calculating good time credit so that fractions for partial credit are rounded *up*, thereby rewarding the good behavior, treating prisoners fairly, and saving taxpayer dollars.

- The BOP should either promulgate rules to implement good time for sentences adjusted to reflect concurrent state sentences under § 5G1.3(b), or Congress should enact a legislative fix.

Each recommendation is explained in more detail below.

1. Method of calculating good conduct time

The GAO reports that most inmates receive the maximum good time credit allowed under the BOP's methodology, but the BOP's methodology results in a maximum of only 47 days of good time credit earned per year of sentence imposed, rather than the 54 days stated in 18 U.S.C. § 3624(b). GAO Report at 23. While its methodology was upheld by the Supreme Court,[40] the BOP recognizes that the extra seven days served as a result of its calculations cost taxpayers millions of unnecessary tax dollars. The BOP informed the GAO that it supports amending § 3624(b) and has submitted a legislative proposal to Congress "such that 54 days would be provided for each year of the term of imprisonment originally imposed by the judge, which would result in inmates serving 85 percent of their sentence." GAO Report at 24.

As noted by the GAO, the Sentencing Commission established the sentencing guidelines on the assumption that defendants would serve 85% of the sentence, and thus on the assumption that serving 85% of the sentence will be sufficient to serve the "need to protect the public from further crimes of the defendant." 18 U.S.C. § 3553(a)(2)(C). In contrast, the BOP formula requires no less than 8.71 years in prison on a 10-year sentence, or 87.1% of their sentence, for no reason related to sentencing purposes. GAO Report at 24. By calculating the good time credit so that inmates serve 85% of the sentence originally imposed, the proposed legislative fix

[40] *Barber v. Thomas*, 130 S. Ct. 2499 (2010).

would better calibrate sentences served with the guidelines and policies set forth by the Sentencing Commission, and the purposes of sentencing set forth by Congress.

It would also be consistent with Congress's understanding of the 85% rule. In 1995, then-Senator Joseph Biden described bipartisan support for the law requiring states to demonstrate that state prisoners "serve not less than 85% of the sentence imposed" as a condition of federal assistance. 42 U.S.C. § 13704(a) (2000).[41] He described this 85% rule in terms identical to the legislation the BOP now seeks: "In the Federal courts, if a judge says you are going to go to prison for 10 years, you know you are going to prison for at least 85% of that time – 8.5 years, which is what the law mandates. You can get up to 1.5 years in good time credits, but that is all."[42]

As recognized by Justice Kennedy, calculating good time so that inmates earn the full 54 days and serve 85% of their sentence would not only treat more fairly those "who have behaved the best" and better serve the purposes of the statute, but it would also save "untold millions of dollars."[43] The BOP provided estimates to the GAO showing that if the BOP increased the good time credit by seven days, 3,900 incarcerated inmates would be released in the first fiscal year after the change, saving approximately $40 million in that year alone. GAO Report at 25. Over the next several years, the savings would amount to hundreds of millions of dollars.

2. Inmates with disabilities

The GAO notes that inmates who have not earned a high school diploma or made "satisfactory progress" toward a diploma or equivalent degree receive 12 fewer good time credits per year. GAO Report at 21. The reality is that many federal prisoners are mentally ill, or have learning disabilities or language impediments. The statute requires the BOP to consider an inmate's educational efforts in awarding good time credit,[44] but the BOP should assure that an inmate's disability, which may impair his ability to participate in educational classes or complete the 240-hour general education program, does not result in denial of good time credits. The twelve days saved multiplied by each year of a sentence for all prisoners with serious educational problems would result in significant savings.

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[41] 140 Cong. Rec. S12314-01, 12350 (daily ed. Aug. 23, 1994) (statement of Sen. Biden) ("So my Republican friends in a compromise we reached on the Senate floor back in November . . . said no State can get any prison money unless they keep their people in jail for 85 percent of the time *just like we do at the Federal level* in a law written by yours truly and several others.") (emphasis added).
[42] 141 Cong. Rec. S2348-01, S2349 (daily ed. Feb. 9, 1995) (statement of Senator Biden).
[43] *Barber v. Thomas*, 130 S. Ct. 2499, 2512 (2010) (Kennedy, J., dissenting).
[44] 18 U.S.C. § 3624(b).

3. Partial days

Although not addressed by the GAO, the BOP should address another small way in which sentences are unnecessarily extended. Under the BOP's formula for implementing good time credit, credit is earned based on time *served*, rather than sentence imposed, with each day served earning 0.148 of a day of credit, which is the fraction of 54 days that can be earned on each of the 365 days in a year.[45] So, for example, after seven days served, an inmate earns one full day of credit (0.148 x 7 = 1.036). However, in calculating the amount of time remaining that must be served in the final year, the BOP rounds *down* to the nearest whole number any fraction of a day.[46] As the BOP explains in its Program Statement:

> Since .148 is less than one full day, no GCT can be awarded for one day served on the sentence. Two days of service on a sentence equals .296 (2 x .148) or zero days GCT; three days equals .444 (3 x .148) or zero days GCT; four days equals .592 (4 x .148) or zero days GCT; five days equals .74 (5 x .148) or zero days GCT; six days equals .888 (6 x .148) or zero days GCT; and seven days equals 1.036 (7 x .148) or 1 day GCT. The fraction is always dropped.[47]

By its rule that "the fraction is always dropped," the BOP denies any credit on partially earned days. Given that it is likely that virtually all prisoners will earn a fraction of good time in their last year under the BOP's formula, and will have their good time credit rounded *down* by one day, and given that approximately 4,500 prisoners are released from BOP custody every year, the single days lost add up to 12.3 years, which at the average incarceration cost per year of $28,284, amounts to about $347,893 wasted every year. With the stroke of a pen, the BOP could change the rule to provide for rounding up, thereby rewarding the good behavior, treating prisoners fairly, and saving taxpayer dollars.

4. Concurrent state sentences

A problem with the implementation of the federal good time credit statute arises when a judge adjusts a sentence pursuant to § 5G1.3(b) of the sentencing guidelines to account for a "period of imprisonment already served on [an] undischarged term of imprisonment" and to achieve full concurrency of the state and federal sentence. For example, under this provision and the statutes governing concurrency and credit for time served (18 U.S.C. §§ 3584, 3585). a person charged in both state and federal court with the same gun offense, and who has already served part of the state sentence in state custody, will receive a reduction at the time of

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[45] BOP Program Statement 5880.28, at 1-44-45 (Feb. 21, 1992) (Sentence Computation Manual) ("The GCT formula is based on dividing 54 days (the maximum number of days that can be awarded for one year in service of a sentence) into one day which results in the portion of one day of GCT that may be awarded for one day served on a sentence. 365 days divided into 54 days equals .148.").

[46] The only exception is if the formula does not produce a number equal to the number of days remaining to be served. Under these circumstances, the BOP rounds up. *Id.*

[47] *Id.*

sentencing in federal court to account for the time already served on the concurrent state sentence. This is because, as the Sentencing Commission explained, the BOP will not credit time against a federal sentence that has been credited against another sentence, even if the sentencing judge intends the time to be served concurrently.[48] To harmonize the statutes and the guidelines, courts have held that state concurrent time served prior to the federal sentencing constitutes "imprisonment" that counts toward service of even a mandatory minimum sentence pursuant to the adjustment under § 5G1.3(b).[49]

When the federal good time credit statute is considered in conjunction with § 5G1.3(b), the period of time served concurrently on the state sentence should, assuming good behavior by the prisoner, result in the good time credits against that period of "imprisonment." As he does for time spent in pre-trial custody on federal charges, regardless whether in a state or federal institution, the inmate should receive good time credits for time served on the state sentence in state custody equal to the amount he would have gotten had he served the state concurrent time in federal prison. By ignoring the period of time that was already served by the prisoner and that was effectively credited against the federal sentence by virtue of § 5G1.3, similarly situated prisoners serve varying times of actual custody, even when the total sentence intended by the judge is identical, based on the timing of sentencing.

A simple example illustrates the unwarranted differences resulting from accidents of timing. Defendants A, B, and C each were charged in both state and federal court with being a felon in possession of a firearm. Each was sentenced to 60 months in prison in state court. Each was sentenced to 115 months in federal court for the same offense, to be served concurrently with the state sentence. With maximum good time credits, the same 115-month term would vary depending on the time of the imposition of sentence in each jurisdiction:

> Defendant A was sentenced in the federal court before having served any state time. He will serve his entire 60-month state sentence while serving his federal sentence. He will serve 115 months in exclusive BOP custody, less 451 good time credits, or *3,047* days in custody.

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[48] 18 U.S.C. § 3585(b) (requiring credit for pretrial custody in official detention "that has not been credited against another sentence").

[49] *See, e.g.*, *United States v. Rivers*, 329 F.3d 119, 122-23 (2d Cir. 2003) ("the effect of an adjustment is similar to that of a credit"); *United States v. Dorsey*, 166 F.3d 558, 563 (3d Cir. 1999) (§ 5G1.3 harmonizes § 3584 and § 3585 to award credit on concurrent sentences because "[a] sentence cannot be concurrent if the random chance of when multiple sentences are imposed results in a defendant serving, contrary to the intent of the sentencing court, additional and separate time on one sentence that was meant to be served at the same time as another sentence"); *United States v. Campbell*, 617 F.3d 958, 961 (7th Cir. 2010) (the same analysis applies to both § 5G1.3(b) and § 5G1.3(c) because "[i]t is § 3584 that gives a sentencing court the discretion to impose a concurrent sentence, taking into consideration the factors set forth in § 3553(a)"); *United States v. Drake*, 49 F.3d 1438, 1440-41 (9th Cir. 1995) (to not harmonize the concurrent sentencing statutes would "frustrate the concurrent sentencing principles mandated by other statutes" (quoting *Kiefer*, 20 F.3d at 877)).

> Defendant B was sentenced in federal court after having already served 21 months on his concurrent state sentence. The judge adjusted his 115-month sentence downward by 21 months under § 5G1.3 -- to 94 months -- and he will serve the remaining months on the state sentence while serving his federal sentence. He will serve 94 months in exclusive BOP custody, less 369 good time credits, or *3,129* days in custody, or 76 more days than Defendant A.
>
> Defendant C was sentenced in federal court after having served nearly all of the 60 months on his concurrent state sentence. The judge adjusted his 115-month sentence by the full 60 concurrent months under § 5G1.3 -- to 55 months. He will serve 55 months in exclusive BOP custody, less 216 good time credits, or *3,282* days in custody, or 229 more days than Defendant A.

There is simply no legitimate reason for identical defendants, who commit identical crimes, to serve different terms of actual custody. As the Supreme Court has stated, "We can imagine no reason why Congress would desire the presentence detention credit, which determines how much time an offender spends in prison, to depend on the timing of his sentencing."[50]

To be sure, the Ninth and Second Circuits recently upheld the BOP's policy of not awarding good time credit for time served on a concurrent state sentence that was the basis for an adjustment under § 5G1.3.[51] However, both courts did so based on an interpretation of "term of imprisonment" under 18 U.S.C. § 3624(b), the good time statute, that is both inconsistent with the courts' interpretation of "imprisonment" in the context of § 3584(a) and § 5G1.3 regarding concurrency (including the Ninth Circuit's own), and inconsistent with the Supreme Court's interpretation of "term of imprisonment" for purposes of calculating good time credit under *Barber v. Thomas*.[52] Petitions for certiorari have been filed in both cases.

The BOP should either promulgate rules to implement good time for sentences adjusted under § 5G1.3(b), or Congress should enact a legislative fix. Awarding good time credits for time spent in concurrent state custody would not only lead to more fair results, it would save the money for every unnecessary day served, which adds up. If the BOP awarded good time credits just to Defendant C, above, for the 229 unnecessary days served, it would save taxpayers $17,749.

D. The BOP Underutilizes Sentence Reductions Under 18 U.S.C. § 3582(c)(1)(A).

The GAO reports that the BOP "has authority to motion the court to reduce an inmates' sentence in certain statutorily authorized circumstances, but that authority is implemented infrequently, if at all." GAO Report at 25. Changes in the way the BOP implements one of

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[50] *United States v. Wilson*, 503 U.S. 329, 335 (1992).
[51] *Schleining v. Thomas*, 642 F.3d 1242, (9th Cir. 2011); *Lopez v. Terrell*, 654 F.3d 176 (2d Cir. 2011).
[52] *Barber*, 130 S. Ct. at 2501 (holding that "term of imprisonment" unambiguously means the actual time served in prison for the federal offense).

these authorities would result in further savings, while further investigation may be required for another.

1. Extraordinary and compelling reasons

Under 18 U.S.C. § 3582(c)(1)(A), the BOP may file a motion with the court to reduce a term of imprisonment if, after considering applicable factors under § 3553(a), the court finds "extraordinary and compelling reasons" that warrant such a reduction, and the reduction is "consistent with applicable policy statements issued by the Sentencing Commission." But the BOP has motioned sentencing judges for such a reduction in exceedingly few cases.[53] The BOP's infrequent use of this authority stems from unnecessarily restrictive BOP policies that keep prisoners in custody despite "extraordinary and compelling reasons."

As the GAO notes, the BOP has historically interpreted "extraordinary and compelling circumstances" as limited to cases in which the inmate "has a terminal illness with a life expectancy of 1 year or less or has a profoundly debilitating medical condition." GAO Report at 25. The BOP's regulation requires "*particularly* extraordinary and compelling reasons,"[54] which in practice arose only when the prisoner was almost dead. In fact, in 14.9% of cases, the prisoner died before receiving a ruling from the court.[55]

In 2006, the Sentencing Commission finally implemented Congress's 1987 directive to promulgate a general policy statement governing the exercise of judicial discretion in deciding motions for sentence reduction for "extraordinary and compelling reasons" under § 3582(c)(1)(A).[56] In 2007, the Commission expanded the list of criteria that may warrant early release to include terminal illness with no limit on life expectancy; a "permanent physical or medical condition," or "deteriorating physical or mental health" due to aging "that substantially diminishes the ability" of the inmate to care for himself in an institution and for which treatment "promises no substantial improvement"; and the death or incapacitation of the only family member capable of caring for the inmate's minor children.[57] Though belated, the Sentencing Commission established this policy in the exercise of its delegated power to establish

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[53] Of 89 requests for early release filed from calendar year 2009 through 2011, 55 were approved by the BOP director. GAO Report at 26.

[54] 28 C.F.R. § 571.61 (emphasis added).

[55] Judy Garret, Deputy Dir., Office of Information, Policy & Public Affairs, Federal Bureau of Prisons (May 2008), available at http://or.fd.org/ReferenceFiles/3582cStats.pdf.

[56] *See* GAO Report at 25 n.46 (noting the directive at 28 U.S.C. § 994(t)); 28 U.S.C. § 994(t) (directing the Commission to "describe what should be considered compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples"); *see* U.S. Sent'g Guidelines Manual § 1B1.13 (2006) (policy statement).

[57] *See* U.S. Sent'g Guidelines Manual § 1B1.13 cmt. (n.1(A)) (2011) (policy statement). The Commission's commentary is non-exclusive: the motion can be based on factors "other than, or in combination with" its listed factors, which the Supreme Court has indicated should include unanticipated developments after sentencing "that produce unfairness to the defendant." *Setser v. United States*, __ S. Ct. __, No. 10-7387, 2012 WL 1019970, at *6-7 (Mar. 28, 2012).

"sentencing policies and practices that [] assure the meeting of the purposes of sentencing" and that "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. § 991(b)(1)(A), (C).

As the GAO noted, however, the BOP has not changed its written policy to include the criteria developed by the Commission and which govern judicial consideration of a motion under § 3582(c)(1)(A). GAO Report at 25. While the GAO notes that the BOP says it is "reviewing two cases" that fall into the Commission's expanded criteria, we do not actually know how many more inmates would *apply* for a reduction if the policy were amended to expressly include the Sentencing Commission's criteria for sentence modification under this provision. By failing to amend its written policy to encompass the criteria deemed appropriate by the Commission, the BOP discourages applications and deprives sentencing judges of the opportunity to reduce the sentences of deserving prisoners and to reduce, for those with permanent medical conditions, some of the highest costs of incarceration.

The BOP further contributes to underutilization of this authority by filing a motion only when the BOP itself has determined that the motion should be granted. Under § 3582(c), however, the *court* is to exercise its discretion in determining whether and by how much to grant a motion "after considering the factors set forth in [] § 3553(a)." The BOP takes the position that because it is the only party authorized to file such motions, it controls whether the court's discretion is ever triggered in the first place. A recent Oregon case illustrates the problem. Phillip Smith received a 156-month sentence for dealing less than half an ounce of methamphetamine. With approximately 29 months left on his sentence, Mr. Smith was diagnosed with terminal leukemia. The BOP repeatedly refused to file a motion to reduce his sentence, not because Smith did not qualify even under the BOP's brink-of-death standard, but because its "compassionate release" committee determined that his criminal history did not warrant relief. But it is the *court* that decides whether the "need to protect the public from further crimes of the defendant" will or will not be adequately served by early release.[58] By determining itself whether a motion should be granted, rather than simply whether a potentially meritorious motion should be *filed*, the BOP transformed a gatekeeping role into the role of final judge. In doing so, it circumvented Congress's expectation that judges would decide, in the exercise of their discretion, the merits of a motion to reduce sentence.

In addition to increasing incarceration costs, the BOP's failure to implement the Sentencing Commission's broader definition of "extraordinary and compelling reasons" and its refusal to file potentially meritorious motions raises serious separation of powers issues. In effect, the Executive Branch, through the BOP, is usurping the authority of the Sentencing Commission, located in the Judicial Branch and to which Congress delegated the primary task of establishing policy regarding these sentence reductions. It is also usurping the discretionary judicial function of Article III judges by refusing to file motions unless the BOP has already

[58] 18 U.S.C. § 3553(a)(2)(C).

determined in its discretion that the motion should be granted. As the Supreme Court recently stated, "[t]he Bureau is not charged with applying § 3553(a)."[59]

RECOMMENDATIONS

- The BOP should immediately adopt the Sentencing Commission's broader standard for deciding what constitutes "extraordinary and compelling reasons."

- The BOP should exercise no more than a reasonable gatekeeping function by simply notifying the sentencing judge when such reasons for sentence modification arguably appear.

By relying on robust judicial review where circumstances have significantly changed, the BOP can substantially expand the use of this statutory program for sentence reduction, thereby checking unnecessary growth in the prison population and avoiding substantial costs for medical services, with no danger to public safety.

2. Inmates sentenced to mandatory life under 18 U.S.C. § 3559(c)

The BOP also has the authority to file a motion for a reduction in sentence for an inmate who is at least 70 years old and has served at least 30 years in prison pursuant to a sentence imposed under § 3559(c), and the BOP has determined that the inmate "is not a danger to the safety of any other person or the community" considering the factors set forth at § 3142(g).[60] The reduction must also be "consistent with the applicable policy statement" issued by the Sentencing Commission, but the Commission has not issued a policy statement governing such motions. According to the BOP, it has never had an inmate in its custody meeting these criteria. However, it is not clear whether this is because there are no inmates convicted under § 3559(c) who are over 70 and have served at least 30 years on their sentence, or because the BOP has determined that every such inmate poses a danger.

RECOMMENDATION

- The GAO should carefully examine the BOP's assertion that there are no inmates meeting the criteria for early release under this provision in determining whether this may be an additional area that could be better utilized for increased cost savings.

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[59] *Setser*, *supra*, at *5.
[60] 18 U.S.C. § 3582(c)(1)(A)(ii).

E. The BOP Should Reinstate the Congressionally Approved Shock Incarceration Program.

As noted by the GAO, the BOP discontinued its shock incarceration program – known as boot camp – in 2005. The program, authorized by 18 U.S.C. § 4046, allowed for a sentence reduction of six months and extended community corrections for nonviolent offenders with minimal criminal histories who successfully completed the program. As described by the GAO,

> Throughout the typical 6-month program, inmate participants were required to adhere to a highly regimented schedule of strict discipline, physical training, hard labor, drill, job training, educational programs, and substance abuse counseling. BOP provided inmates who successfully completed the program and were serving sentences of 12 to 30 months with a sentence reduction of up to 6 months. All inmates who successfully completed the program were eligible to serve the remainder of their sentences in community corrections locations, such as RRCs or home detention.

GAO Report at 27-28. The GAO reports that, according to the BOP, the BOP discontinued the program "due to its cost and research showing that it was not effective in reducing inmate recidivism." GAO Report at 27. The GAO reports that "a study of one of BOP's shock incarceration programs, published in September 1996, found that the program had no effect on participants' recidivism rates." GAO Report at 28. The BOP also cited "other evaluation findings and the cost of the program," GAO Report at 28, but apparently did not say what those other findings are or provide the cost of the program.

In 2005, the Director of the BOP sent a memorandum to federal judges, prosecutors, probation officers, and federal defenders stating that, due to budget constraints and supposed studies showing the program was not effective, the program was being eliminated, effective immediately. In subsequent litigation, these representations turned out to be questionable. The BOP's assistant director of research and evaluation testified that no new studies had been conducted regarding the efficacy of the federal boot camp program; that the state studies the BOP relied on did not address federal boot camps, which limit eligibility and require follow-up in community corrections; and that the change went into effect with little internal discussion. In fact, the study of the Lewisburg boot camp, cited by the GAO, found that those who graduated from the boot camp program had a rearrest rate of only 13.0 % during the first two years in the community, slightly less than similar minimum-security inmates otherwise eligible for the program but who did not participate in it.[61] The study reported that the 13.0% re-arrest rate for boot camp graduates "is substantially lower than that for graduates in similar programs run by State correctional systems,"[62] and described the program as having "demonstrated success

[61] Miles D. Harer & Jody Klein-Saffran, BOP Office of Research and Evaluation, *Evaluation of Post-Release Success for the First 4 Classes Graduating from the Lewisburg Intensive Confinement Center*, at 1 (Nov. 15, 2006).
[62] *Id.* at 6.

regarding low rearrest rates."[63] It reported that program participants were more likely to have made pre-release employment plans, and that such plans "had a significant and dramatic effect in reducing recidivism."[64]

Regarding costs, the study estimated that the BOP would save almost $10,000 in incarceration costs for each inmate who participated in the boot camp program and whose sentence was reduced by the full 6 months, and over $2,500 for each inmate whose sentence was reduced by 3 months.[65] While the bulk of inmates transferred into the program were not eligible for a sentence reduction, they were eligible for earlier release to a halfway house and home detention.[66]

In addition to cost savings from shorter periods of incarceration, the study found that "the program also has the benefit of returning very low risk offenders sooner to their families and their jobs," contributing to "inmate family stability, which criminological research shows to be a key element in reducing juvenile delinquency and crime among future generations."[67] The study suggested that the BOP *expand* the program and inform eligible inmates sooner of the opportunity to participate in it, both to provide an incentive for good behavior and to allow earlier placement in halfway houses for those who participate in the program but who are not eligible for the sentence reduction.[68]

The boot camp program was well received by almost all participants in the federal system. The Sentencing Commission promulgated a guideline addressing it at § 5F1.7, in Part 5 of Chapter 5 ("Sentencing Options"). Both the statutory authorization in 8 U.S.C. § 4046 and the guideline at USSG § 5F1.7 remain in force.

RECOMMENDATION

- The BOP should reinstate the federal boot camp program to restore a congressionally favored sentencing option that shortens prison terms, prepares inmates for employment, and returns inmates to their families and communities sooner.

Doing so would also save money. As explained above, home detention costs less than incarceration for minimum-security inmates, who have less need for transitional placement in a halfway house. Minimum-security inmates who complete the boot camp program should have even less need for transitional halfway house time. By reducing the sentence of a minimum-security inmate by six months and then by placing her directly into home detention for the full

[63] *Id.* at 7.
[64] *Id.* at 5.
[65] *Id.* 1-2 & tbl. 2
[66] *Id.* at 8.
[67] *Id.* at 2.
[68] *Id.* at 7-8.

six months at the end of her sentence, the BOP would save over $14,000. GAO Report at 19. Although we do not know how many inmates would be eligible for a sentence reduction, even if there were only 1,000 eligible inmates per year, their successful completion of the boot camp program would save taxpayers over $14 million.

F. When a State Court Imposes a State Sentence To Run Concurrently with a Previously Imposed Federal Sentence, the BOP Should Execute the Sentences To Achieve Concurrency.

Some inmates are prosecuted and sentenced in both federal and state court for the same offense. As noted by the GAO, the BOP has the authority to credit time served in a state institution toward an inmate's federal sentence, resulting in concurrent sentences. GAO Report at 28. In many instances, the federal court imposes its sentence before the state court imposes sentence, and does so without specifying whether the federal sentence is to be served consecutively or concurrently with any yet-to-be-imposed state sentence.[69] When the state court later imposes sentence, it may explicitly order it to be served concurrently with the federal sentence already imposed. However, the BOP presently has a policy that allows it to unilaterally reject a state court judge's determination that a state sentence should run concurrently with a previously-imposed federal sentence, creating what amounts to an expensive consecutive sentence imposed by no judge.[70]

In its recent decision in *Setser v. United States*, the Supreme Court emphasized principles of comity and respect for state court decisions. Although the federal court in *Setser* stated at the time of sentencing whether the federal sentence was to be served concurrently or consecutively with the anticipated state sentence, the Court indicated that, in the absence of such a statement, it would be disrespectful to a state's sovereignty for the BOP to decide, *after* the state court has expressly decided to run its sentence concurrently, not to credit the state time served against the federal sentence.[71] The Court suggested that the BOP has no business being engaged in what amounts to sentencing,[72] which is essentially what it is doing when it rejects a state court decision to impose a concurrent sentence. Indeed, the Supreme Court has long held that, in the spirit of comity and mutual respect, the federal government must credit state court judgments, which have equal validity in a system of dual sovereignties with equal sentencing rights.[73] The BOP's rules do not respect state judgments. The Executive Branch has no legitimate interest in

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[69] *See Setser v. United States*, __ S. Ct. __ , No. 10-7387, 2012 WL 1019970 (Mar. 28, 2011) (holding that the federal court has the authority to specify whether the federal sentence is to be served concurrently or consecutive to any anticipated state sentence).
[70] BOP Program Statement 5880.28, at 1-32A (June 30, 2007).
[71] *Setser*, 2012 WL 1019970, at *6.
[72] *Id.*, at *5 (rejecting an interpretation of § 3621(b) as giving the BOP "what amounts to sentencing authority"); *id.* at *6 n.5 (noting that to the extent that the Executive may have had effective "sentencing authority" in its ability to grant or deny parole, the Sentencing Reform Act's "*principle objective was to eliminate the Executive's parole power*" (emphasis in original)).
[73] *Ponzi v. Fessenden*, 258 U.S. 254, 259-60 (1922).

violating the rules of comity by undercutting a state concurrent sentence through the manner in which it executes the federal sentence.

RECOMMENDATION

- The BOP should execute the statute to fully credit a later state sentence that is imposed to run concurrently with a previously imposed federal sentence.

Non-judicial consecutive sentences create tremendous waste. The GAO reports that the BOP made what was functionally a judicial decision regarding concurrency in 538 such cases in fiscal year 2011, requiring consecutive sentences in the vast majority of these cases. GAO Report at 28-29. The 99 inmate requests for concurrency that were granted resulted in a total of 118,700 fewer days to be served in federal custody. At an average cost of $77.49 per day of incarceration,[74] these decisions resulted in a savings of $9.2 million.

An example of waste can be seen in a single example. A federal defendant pleads guilty in federal court to robbery and receives a 20-year federal sentence. The next day, he is released to state court where the state judge imposes a 20-year sentence for robbery, which the judge orders to run concurrently with the federal time, releasing him back to federal authorities. The BOP sends him back to state custody, where he completes the state sentence. Twenty years later, when he is released to the federal detainer, the BOP treats him as having just started his federal sentence. At current costs of incarceration, this *de facto* consecutive 20 year sentence, with maximum good time credits at the BOPs rate of 87.1%, would cost about $492,144. In the aggregate, the BOP's *de facto* consecutive sentences not only disrespect state courts for no reason, but cost millions of taxpayer dollars.

G. Congress Should Carefully Examine the BOP's Report on the Elderly Offender Pilot Program.

As part of the Second Chance Act, Congress authorized the BOP to conduct the Elderly and Family Reunification for Certain Non-Violent Offenders Pilot Program.[75] Under that two-year pilot program, the BOP was authorized to waive the statutory requirements for community corrections under § 3624 and release some or all of certain eligible elderly offenders to home detention with the purpose of "determin[ing] the effectiveness of removing eligible elderly offenders from a Bureau of Prisons facility and placing such offenders on home detention until the expiration of the prison term."[76] The BOP was directed to "monitor and evaluate each

[74] Administrative Office, Memorandum from Matthew Rowland to Chief Probation Officers, *Cost of Incarceration and Supervision* (June 3, 2011).
[75] Pub. L. No. 111-199, § 231(g) (2007); 42 U.S.C. § 17541(g).
[76] 42 U.S.C. § 17541(g)(1).

eligible elderly offender placed on home detention under [the pilot program], and shall report to Congress concerning the experience with the program at the end of the [pilot] period."[77]

Under the Act, an "eligible elderly offender" is defined primarily by its many exclusions: The offender must be (1) not less than 65 years of age; (2) serving a term of imprisonment other than life; (3) whose term of imprisonment is "based on a conviction for an offense or offenses that do not include any crime of violence, sex offense, or other specified offenses"; (4) who "has served the greater of 10 years or 75 percent of the term of imprisonment"; (5) who "has not been convicted in the past of any Federal or State crime of violence, sex offense, or other offense described [above]"; (6) "who has not been determined by the Bureau of Prisons, on the basis of information the Bureau uses to make custody classifications, and in the sole discretion of the Bureau, to have a history of violence, or of engaging in conduct constituting a sex offense or other offense described [above]"; (7) "who has not escaped, or attempted to escape" from a BOP institution; (8) "with respect to whom the Bureau of Prisons has determined that release to home detention under this section will result in a substantial net reduction of costs to the Federal Government"; (9) "who has been determined by the Bureau of Prisons to be at no substantial risk of engaging in criminal conduct or of endangering any person or the public if released to home detention."

According to the BOP, only 71 inmates were transferred to home detention under the pilot program. The GAO does not report, however, how the BOP made eligibility determinations or which restrictions most impacted eligibility. The GAO reports that the BOP has not yet completed its report concerning its experience with the program, and that the GAO has "ongoing work looking at the results and costs of the pilot" and plans to report on it later this year. GAO Report at 26. At the same time, currently pending before Congress is the Second Chance Re-Authorization Act, S. 1231, which would lower the age of eligibility from 65 to 60, but would leave all other restrictions on eligibility in place.

RECOMMENDATION

- Congress should examine very carefully the BOP's report regarding its experience with the pilot program, as well as any report submitted by the GAO on results and costs to the extent it is based on BOP determinations.

- Congress should consider removing some of the restrictions on eligibility to better address "the humanitarian and financial challenges of housing an aging prison population."[78]

While some eligibility restrictions are driven by statute, others are driven by BOP discretionary determinations. As demonstrated throughout, the BOP often exercises its discretion in a manner that unnecessarily extends a term of incarceration.

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[77] *Id.* § 17541(g)(4).
[78] 153 Cong. Rec. S4430, 4431 (Apr. 12, 2007) (remarks of Senator Kennedy).

H. The BOP Should Provide Credit for Post-Arrest Custody by Immigration Authorities Against the Sentence Imposed.

The statute regarding credit for time served provides broad authority for counting time in pretrial "official detention" in connection with an offense.[79] However, in immigration cases, with no statutory authorization, the BOP implements the statute so that time in administrative custody of Immigration and Customs Enforcement (ICE) is not credited toward time served.[80] In the past ten years, the number of defendants sentenced for immigration offenses in federal court has increased nearly three-fold, from 11,689 in 2000 to 29,717 in 2011.[81] In many of these cases, prisoners are held in immigration custody while the federal criminal prosecution is arranged. Because the time in administrative custody follows ICE's knowledge of the alien's unlawful presence, the time easily falls within the scope of "official detention" in relation to the offense.

Nonetheless, the BOP has adopted a rule that categorically denies credit for time spent in administrative custody of the immigration service. The BOP has not articulated a reason for this rule in the administrative record, and there is no conceivable justification for it. At bottom, the rule unnecessarily extends the period of incarceration for large numbers of alien defendants at a cost of millions of wasted dollars. It also creates unwarranted disparity. For example, a bank robber who is first held in state custody for 30 days, then is released to federal custody when the state case is dismissed, receives full credit for the 30 days spent in state custody against the federal bank robbery sentence. But an undocumented alien who spends 30 days in ICE administrative custody before being charged in federal court for being illegally in the country does not receive credit against the federal sentence for the 30 days spent in ICE detention. The BOP's rule also creates unwarranted sentencing disparities between similarly situated alien defendants, depending on the vagaries of custodial decisions that are irrelevant to the purposes of sentencing.

RECOMMENDATION

- The BOP should amend its rules to credit time served in administrative custody of the Immigration and Customs Enforcement.

Conclusion

The GAO Report provides an invaluable service in demonstrating huge waste from underutilization of ameliorative statutes. The GAO's findings serve as an excellent starting point to identify actions the BOP can take, some facilitated by congressional action, that will both reduce the real dangers associated with overcrowding and save taxpayers hundreds of millions of

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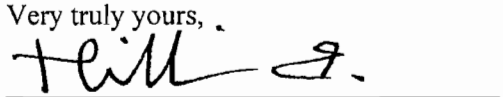
[79] 18 U.S.C. § 3585(b).
[80] BOP Program Statement 5880.28, at 1-15A (Feb. 14, 1997).
[81] U.S. Sent'g Comm'n, Sourcebook of Federal Sentencing Statistics, tbl.3 (2000); U.S. Sent'g Comm'n, Sourcebook of Federal Sentencing Statistics, tbl. 3 (2011).

dollars. The administrative and statutory changes recommended here will also promote reduced recidivism by allowing more inmates to participate in beneficial programs and to be released sooner into the community.

Very truly yours,



Thomas W. Hillier, II
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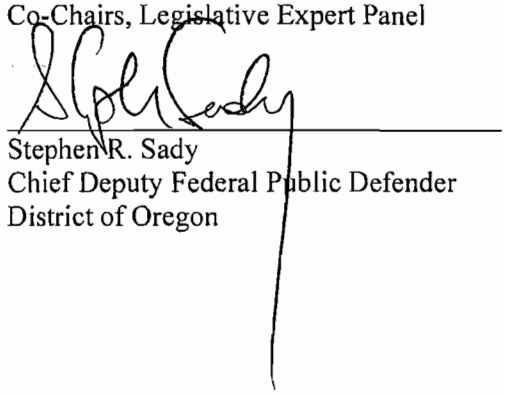

Stephen R. Sady
Chief Deputy Federal Public Defender
District of Oregon

SUMMARY OF RECOMMENDATIONS

A. Residential Drug Abuse Program (RDAP) – 18 U.S.C. § 3621(e)

- The BOP should take the steps necessary to ensure that all inmates who successfully complete RDAP receive the full 12-month reduction, regardless of sentence length. This would save over $45 million a year in prison costs alone, with additional societal savings realized through reduced recidivism, better employment prospects, and stronger family ties.

- The BOP should rescind its categorical rule excluding inmates with detainers from participating in RDAP. This would save *at least* another $25 million a year, likely much more.

- The BOP should rescind its categorical rules excluding (1) inmates convicted of possession of a firearm and those convicted of a drug offense who received an enhancement under the guidelines because a weapon "was possessed" and (2) inmates previously convicted of an offense involving violence, no matter how minor or how old. This would save many more millions in prison costs, and would likely result in similar rates of reduced recidivism and increased societal benefits.

B. Residential Reentry and Home Detention – 18 U.S.C. § 3624(c)

- The BOP should abandon the informal six-month limitation on community corrections and promulgate a regulation that includes a presumption of maximum available community corrections, limited only by considerations of individualized risk and resources.

- The BOP should include as part of this new regulation a description of studies and analyses it considered in arriving at criteria for the exercise of individualized discretion to maximize the duration of community confinement.

- The BOP should direct earlier placement of inmates in RRCs to maximize the ensuing home confinement component of community corrections.

- To maximize savings, the BOP should follow its policy to ensure that more higher-security inmates are placed in RRCs, and more minimum-security inmates are placed directly to home-confinement and for longer periods.

C. Good Conduct Time (GCT) – 18 U.S.C. § 3624(b)

- Congress should pass the legislation proposed by the BOP so that the full 54 days of good time credit will be awarded for each year of imprisonment imposed. This change would save approximately $40 million in the first year alone.

- The BOP should assure that an inmate's disability, which may impair his ability to participate in educational classes or complete the 240-hour general education program, does not result in a loss of good time credit and unnecessary costs of extended incarceration.

- The BOP should change its methodology for calculating good time credit so that fractions for partial credit are rounded *up*, thereby rewarding the good behavior, treating prisoners fairly, and saving taxpayer dollars.

- The BOP should either promulgate rules to implement good time for sentences adjusted to reflect concurrent state sentences under § 5G1.3(b), or Congress should enact a legislative fix.

D. Modification of an Imposed Sentence – 18 U.S.C. § 3582(c)

- The BOP should immediately adopt the Sentencing Commission's broader standard for deciding what constitutes "extraordinary and compelling reasons."

- The BOP should exercise no more than a reasonable gatekeeping function by simply notifying the sentencing judge when such reasons for sentencing modification arguably appear.

- The GAO should carefully examine the BOP's assertion that there are no inmates meeting the criteria for early release under this provision in determining whether this may be an additional area that could be better utilized for increased cost savings.

E. Shock Incarceration Program – 18 U.S.C. § 4046

- The BOP should reinstate the federal boot camp program to restore a congressionally favored sentencing option that shortens prison terms, prepares inmates for employment, and returns inmates to their families sooner. Shorter prison terms mean less cost and greater chance for successful reentry.

F. Elderly Offender Pilot Program – 42 U.S.C. § 17541(g)

- Congress should examine very carefully the BOP's report regarding its experience with the pilot program, as well as any report submitted by the GAO on results and costs.

- Congress should consider removing some of the restrictions on eligibility to better address the humanitarian and financial challenges of housing an aging prison population.

G. Sentence Computation Authority to Allow Concurrent Service of State and Federal Sentences – 18 U.S.C. § 3584

- The BOP should fully credit a later state sentence that is imposed to run concurrently with a previously imposed federal sentence.

H. Credit for Time Served in Custody – 18 U.S.C. § 3585(b)

- The BOP should amend its rules to credit time served in administrative custody of the Immigration and Customs Enforcement.

ATTACHMENT A

FEDERAL PUBLIC DEFENDER
Western District of Washington

Thomas W. Hillier, II
Federal Public Defender

November 16, 2011

Thomas R. Kane
Acting Director, Federal Bureau of Prisons
c/o Rules Unit
Office of General Counsel, Bureau of Prisons
320 First Street, NW
Washington, DC 20534

Re: Comment On Proposed Regulations
Pre-Release Community Confinement
76 Fed. Reg. 58197-01 (Sept. 20, 2011)

Dear Director Kane:

This letter is to provide comment on behalf of the Federal Public and Community Defenders regarding the proposed regulation implementing the pre-release community confinement provision of the Second Chance Act (SCA). The Defenders represent the indigent accused in almost every judicial district of the United States pursuant to authorization in 18 U.S.C. § 3006A. The Defenders viewed as a very favorable development the bipartisan support for the SCA's increase of available pre-release community corrections from six to twelve months in 18 U.S.C. § 3624(c). We anticipated that the increased utilization of halfway houses and home detention would promote our clients' more successful reintegration into the community through earlier family reunification, establishment of employment, treatment in the community, and separation from the negative aspects – and dangers – of prison life. The increased length of reentry programming would also reduce prison over-crowding, resulting in safer prisons and lower prison costs.

In contrast to the optimism generated by the SCA's statutory shift in favor of more pre-release community confinement, the Defenders have been disappointed in the Bureau of Prisons (BOP)'s failure to implement meaningful change by continuing the informal rule that effectively limits pre-release community confinement to six months. The proposed regulation does nothing to correct the BOP's failure to effectuate Congress's directive that the optimum duration of community corrections should be addressed by regulation and that the available period of community corrections for individual prisoners should be doubled from six to twelve months. Our comments address three aspects of the new regulation. First, the regulation appears to violate Congress's requirement that the BOP "shall" promulgate regulations to ensure that the length of community corrections is "of sufficient duration to provide the greatest likelihood of successful reintegration into the community." 18 U.S.C. § 3624(c)(6)(C). Second, the regulation should presume that the maximum period of community corrections should be provided, absent individualized factors disfavoring community corrections for a particular prisoner. Third, the regulation implementing the SCA should reject the

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current informal limitation to six months of community corrections, absent extraordinary circumstances, which is unsupported by empirical evidence and, in effect, nullifies the SCA's increase in the available time in community corrections.

A. The Proposed Regulation Does Not Comply With The Congressional Instruction To Address The Optimal Duration Of Pre-Release Community Corrections.

An essential component of the SCA's change in reentry policy was the doubling of the available pre-release community corrections – halfway houses and home detention – from six to twelve months. 18 U.S.C. § 3624(c). The same statute required that, within 90 days of enactment, the BOP "shall" implement the reforms to the pre-release community placement statute through the formal procedures provided under the Administrative Procedure Act (APA). 18 U.S.C. § 3624(c)(6) ("The Director of the Bureau of Prisons *shall* issue regulations" regarding the "sufficient duration" of community corrections) (emphasis added)). "[D]iscretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking." *Bennett v. Spear*, 520 U.S. 154, 172 (1997). Here, Congress used the mandatory word "shall." The BOP must follow procedural requirements for an exercise of discretion to be lawful: "[T]he promulgation of [the] regulations must conform with any procedural requirements imposed by Congress" because "agency discretion is limited not only by substantive, statutory grants of authority, but also by the procedural requirements which 'assure fairness and mature consideration of rules of general application.'" *Chrysler Corp. v. Brown*, 441 U.S. 281, 303 (1979) (citations omitted).

The SCA explicitly refers to the need for reentry policies to be empirically based. 42 U.S.C. § 17541(d). Congress's intention that the BOP engage in notice-and-comment rule-making effectuates this approach by giving the public and interested organizations, like the Defenders, the opportunity to provide input regarding the duration of community corrections. *See Chrysler Corp.*, 441 U.S. at 316 ("In enacting the APA, Congress made a judgment that notions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an opportunity to comment."); *see also* Conf. Rep. to Consolidated Appropriations Act of 2010, 155 CONG. REC. H13631-03, *H13888 (daily ed. Dec. 8, 2009) (directing the BOP to consult with the public and experts regarding reentry issues). Congress also made the judgment that agencies must do more than simply repeat statutory language: agencies are required to articulate their rationale and explain the data upon which the rule is based. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167-68 (1962). Nevertheless, the proposed regulation provides none of the material required for informed rule-making. Instead, the BOP issued the informal memoranda with no support in best practices, no social science studies, and no articulated rationale with any support in the literature. The proposed regulation appears to be unlawful because it fails to address a critical question that Congress determined should be addressed by fair and neutral rule-making, not by administrative fiat.

B. The Regulation Should Incorporate A Presumption of Maximum Community Corrections In Order To Promote Successful Reentry And To Save Taxpayer Money.

The SCA's amendment of § 3624(c) rests on three assumptions apparent from the legislation: the amount of available time in community corrections should be doubled; the likelihood of successful reentry will be enhanced by earlier reintegration through family reunification, employment, and treatment in the community; and the costs of incarceration can be ameliorated by greater utilization of community resources for those determined not to create substantial risks in the community. The proposed regulation does nothing to further these legislative goals. The BOP should promulgate a regulation that furthers the SCA's reentry goals by presumptively permitting the maximum time available for community corrections, with less time depending on individualized safety factors and availability of facilities.

Congress's intent that placements be longer is reinforced by the Consolidated Appropriations Act of 2010, which provides:

> Because BOP has indicated that approximately $75,000,000 is required to implement fully its Second Chance Act responsibilities, the conferees expect the Department to propose significant additional funding for this purpose in the fiscal year 2011 budget request, including significant additional funding for the enhanced use of Residential Reentry Centers (RRC) as part of a comprehensive prisoner reentry strategy. The conferees also urge the BOP to make appropriate use of home confinement when considering how to provide reentering offenders with up to 12 months in community corrections.

155 CONG. REC. at H13887. Congress thus clearly expressed its continued intention that the BOP fully use its authority to place federal prisoners in the community for as long a period as appropriate to ensure the greatest likelihood of successful reintegration – including greater utilization of halfway houses and home confinement. Congress has indicated that funding considerations will not be tolerated as an excuse for failing to implement fully BOP's responsibilities under the SCA. The six month limit is inconsistent with the statutory instruction to enhance and to improve utilization of community confinement for federal prisoners.

By increasing pre-release community corrections, the BOP can substantially reduce prison over-crowding in facilities that are currently at about 137% of capacity. With greater over-crowding, the danger to both prisoners and correctional officers increases. At the same time, the agency can save scarce resources, redirecting them toward more effective rehabilitative programs. With the exception of foreign nationals, almost all of the 217,363 federal prisoners are eligible for community corrections under the SCA (about 26% of federal prisoners are aliens with immigration holds), with about 45,000 transferred to the community each year.

Besides the greater freedom at stake, enormous saving are available. For one year, incarceration in prison costs about $28,284.00; in a halfway house $25,838.00; and home detention about $3,000.00.[1] So if prisoners were transferred from prison to home confinement even one month earlier, the BOP could save about $94.8 million each year.[2] By increasing the average time in home detention by three months, the BOP would save about $284.4 million every year. Similarly, the cost to keep prisoners in halfway houses rather than in prison for an additional month would save about $9.2 million.[3] The difference for three months would be $27.6 million. And these savings would multiply with each additional year that the SCA is fully implemented. The proposed regulation does not address either the financial or human costs associated with maintaining the status quo.

The BOP should honor both the spirit and letter of the rule-making process. The regulation should be precise so that the public has a meaningful opportunity to comment. The Defenders suggest that the final regulation include, or at a minimum address, the following:

- A presumption of maximum community confinement to facilitate reentry and to save money, with less time based on individual risk factors and resource availability;

- A description of any studies and analyses considered in arriving at criteria for the exercise of discretion to maximize the duration for community confinement to achieve successful reintegration;

- Early placement of prisoners in residential reentry facilities to maximize the home confinement component of community corrections.

In times like these when prisoners are facing great obstacles to successful reintegration, the BOP, through its policies and regulations, should strive to make the difficult transition easier. The SCA provides a clear message that up to the full available year of community corrections should be

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[1] Annual Determination Of Average Cost Of Incarceration, 76 Fed. Reg. 57081 (Sept. 15, 2011); Memorandum from Matthew Rowland to Chief Probation Officers Cost of Incarceration (May 6, 2009).

[2] With 1/12 of the $3000 yearly cost of home confinement equaling $250 for one month, subtracted from one month of prison at $2357 (1/12 of the 28,284 annual costs), equals $2,107, multiplied by 45,000, the number of prisoners released each year to community corrections, equals $94,815,000.

[3] The difference every month of $204.00, multiplied by the 45,000 prisoners released equals $9,180,000.

utilized to reach the greatest likelihood of success on supervised release. The BOP should promulgate a regulation to achieve the SCA's goal by presuming that the prisoner should receive the maximum available community corrections, limited by individualized assessments regarding public safety and available community resources.

C. The Six-Month Informal Rule Should Be Rejected.

The need for a regulation regarding the duration of community corrections is especially acute because, in the absence of a regulation on the subject, the default directive is the BOP's informal six-month rule under memorandums to staff and program statements. The only rationale for the six-month rule proffered by the BOP related to the supposed optimum time in a halfway house. In fact, the evidence presented in the case in which Judge Marsh invalidated the earlier regulation established that the six-month norm was based on erroneous assumptions. Most glaringly, the evidence disclosed that the Director of the BOP erroneously believed there were studies supporting the rule, but the BOP's own records established that no such studies exist:

- The Director claimed that "our research that we've done for many years reflects that many offenders who spend more than six months in a halfway house tend to do worse rather than better. The six months seems to be a limit for most of the folks, at which time if they go much beyond that, they tend to fail more often than offenders that serve up to six months."[4]

- The BOP's research department could not back up the Director's claim, stating "I am trying to find out if there is any data to substantiate the length of time in a 'halfway house' placement is optimally x number of months. That is, was the '6-month' period literally one of tradition, or was there some data-driven or empirical basis for that time frame? . . . I've done a lot of searching of the literature, but so far have not found anything to confirm that the '6-months' was empirically based."[5]

Because the BOP had no meaningful experience with community corrections greater than six months, the erroneous assumption regarding "research" was especially prejudicial. Rather than being

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[4] United States Sentencing Commission, *Symposium On Alternatives To Incarceration*, at 267 (July 15, 2008).

[5] *Sacora v. Thomas*, CV 08-578-MA, CR 48-9 (D. Or. Mar. 1, 2010) (exhibit in support of memorandum of law).

based in empirical research, the six-month rule may simply be a vestige of litigation positions that have been superseded by the SCA.[6]

Even if the erroneous belief regarding halfway house studies had not been debunked, the SCA could still have been implemented to make a difference: even with a six-month limit on the duration of halfway house placements, earlier placement would allow for up to six months of additional time in home detention under § 3624(c)(2). The SCA clearly permits such a change, which would result in significant savings. More importantly for prisoners, earlier community corrections would enable them to accelerate their reintegration into the community through family reunification, work, treatment, and other appropriate community-based programming. The proposed regulation fails to address this aspect of the SCA, leaving intact the informal and unsupported six-month rule.

The six-month informal rule is also irrational because its "extraordinary justification" exception is indistinguishable from "extraordinary and compelling reasons" under 18 U.S.C. § 3582(c). The informal rule states that pre-release community corrections exceeding six months may be permitted only with "extraordinary justification." Program Statement 7310.04 at 8 (Dec. 16, 1998). But under § 3582(c), the BOP is supposed to alert the district court by filing a motion to reduce the sentence for "extraordinary and compelling reasons." The informal rule, by using an indistinguishable standard, creates an irrational and unworkable system in which BOP personnel, instead of permitting more than six-months of community corrections, should be mooting the question by moving the district judge to reduce the sentence.

Conclusion

An essential component of the SCA is the doubling of the available time for pre-release community corrections. By essentially maintaining the pre-SCA status quo, and by failing to promulgate a regulation on the optimal duration for community corrections, the BOP misses the opportunity to implement Congress's intent that reentry be eased by increased custody in the community, with its concomitant promotion of family unity, community-based treatment, and employment in the prisoner's home region. The Defenders speak in one voice in encouraging the BOP to implement the SCA by promulgating a regulation on the duration of pre-release community

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[6] Starting in 2002, the BOP has argued that no community confinement could exceed six months. The pre-SCA litigation depended on two things: the discretion to place prisoners in community confinement under 18 U.S.C. § 3621(b); and the six-month limitation on pre-release custody under the former § 3624(c). With the SCA, Congress has reaffirmed the BOP's authority to place prisoners in community confinement at any time and expanded the pre-release custody to twelve months. Thus, the informal six-month rule no longer has any basis in the relevant statutes.

corrections that abandons the informal six-month limitation and presumes the maximum available community corrections, limited only by individualized safety and resource considerations.

Very truly yours,

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