FAMILIES AGAINST MANDATORY MINIMUMS
Sentences that fit. Justice that works.

November 21, 2011

Sarah Qureshi, Esq.
Rules Unit
Office of General Counsel
Bureau of Prisons
320 First Street, N.W.
Washington, D.C. 20534

Re: Comment on Bureau of Prisons Pre-Release Community Confinement proposed rule (BOP docket number 1151).

Dear Ms. Qureshi,

Please accept this letter commenting on BOP Docket No. 1151, the proposed rule restating the 2008 interim rule on the subject of pre-release community confinement following enactment of the Second Chance Act of 2007 (SCA) (Pub. L. 110-199; 122 Stat. 657). As conveyed in our comments to the 2008 interim rule,[1] we are concerned that the proposed rule (which in pertinent part simply restates the statutory language) fails to provide meaningful guidance to ensure that eligible prisoners spend time "of sufficient duration to provide the greatest likelihood of successful reintegration into the community." In fact, a series of post-SRA BOP memoranda, court cases,[2] and anecdotal accounts confirm that a *de facto* 6-month limitation on community corrections pre-release transfers exists as does a limitation of even less than six months on inmates considered at low risk for recidivism. While on its face the proposed final rule is innocuous, BOP practice since the passage of the SCA and implementation of the interim rule, demonstrate that the rule is insufficient to carry out the clear intention of the SCA. We urge the BOP to redraft its regulation to emphasize that every federal prisoner will be considered for up to 12 months pre-release confinement at a Residential Reentry Center (RRC) as well as up to six months (or ten percent) home confinement, for up to the one-year total that Congress directs, eliminating any categorical or other unsupported limits, such as extraordinary or compelling circumstances.

FAMM is a nonprofit, nonpartisan organization that conducts research, promotes advocacy, and educates the public about issues relating to sentencing justice and sentencing reform. FAMM, whose 50,000 members include criminal justice professionals as well as prisoners and their loved ones, promotes sentencing laws that are individualized, humane and sufficient but not greater than

---

[1] Letter from Todd Bussert and Mary Price to Sarah Qureshi (December 22, 2008).
[2] *See, e.g.* Sacora v. Thomas, 628 F.3d 1059 (2010) see also discussion in S. David Mitchell, *Impeding Reentry, Agency and Judicial Obstacles to Longer Halfway House Placements,* 16 MICH. J. RACE & L. 235 (2010).

necessary to impose just punishment, secure public safety and support successful rehabilitation and reentry. FAMM has a strong interest in ensuring that sentences are served in facilities that are appropriate and give the prisoner the best opportunity to reintegrate into society.

A. In the SCA, Congress responded to BOP limitations on pre-release eligibility.

To appreciate our concern that the proposed rule does not implement Congress's mandate of individualized consideration for halfway house stays of sufficient duration to promote successful reentry, it is useful to understand the background against which Congress legislated. The Second Chance Act sponsors understood the essential role that halfway houses play in the management of federal prisoners and explicitly rejected the Bureau's alteration of policies in 2002 and 2005 governing halfway house use. Sound correctional management philosophy long embraced the use of these penal facilities to address prisoners' varied and individual needs. Federal law has long recognized those practices and mandated that the Bureau of Prisons make individualized determinations about when and where to transfer federal offenders. When the BOP disturbed that practice by informal policy change in 2002 and then by categorical rulemaking in 2005, purportedly limiting its own discretion to choose when to designate an individual to a halfway house, courts rejected these changes almost uniformly. Those judicial opinions in turn informed the drafters of the Second Chance Act, who reaffirmed the Bureau's discretion, and resoundingly expanded the law's guarantee of consideration for pre-release programming from six to 12 months.

The ringing endorsement of robust use of community corrections (including home detention) and direct designation was a repudiation of the BOP's about face on longstanding policy starting in 2002. In response to an inquiry that year from the Attorney General's Office, the Office of Legal Counsel issued a memorandum opinion, on December 13, 2002, that found the BOP's longstanding community corrections practices to be unlawful.[3] Three days later, Deputy Attorney General Larry Thompson drafted a memorandum to BOP Director Kathleen Hawk Sawyer instructing the Bureau to immediately modify its practices. On December 20, 2002, Director Hawk Sawyer issued a Memorandum to Federal Judges announcing changes to the agency's policy, including that judicial recommendations for direct placements would no longer be honored. Concurrently, BOP enacted restrictions on mid-sentence and pre-release transfers to halfway houses, limiting them, with few exceptions, to the final 10% of a prisoner's time served, up to six months — mirroring the limitation § 3624(c) places on the BOP's use of home detention. This became known as the "10% Rule."

Following litigation challenging the end of direct designations and the 10% rule, in August 2004, the BOP published proposed "new rules" in the Federal Register for notice and comment that mirrored precisely the December 2002 OLC opinion and the limits of the 10% rule.[4] These rules abandoned the reliance on misinterpretation of § 3624(c) and instead purported to reflect a "categorical" exercise of "discretion" in applying the BOP's prisoner placement authority.[5] The "new" 10% Rule, which the interim rule addressed, was enacted the following summer.[6]

---

[3] USDOJ-OLC, *Re: Bureau of Prisons practice of placing in community confinement certain offenders who have received sentences of imprisonment* (December 13, 2002). *See Levine v. Apker*, 455 F.3d 71, 74-76 (2d Cir. 2006) (setting out these events).
[4] 69 Fed. Reg. no. 159, at 51215 (Aug. 18, 2004).
[5] See *Levine v. Apker*, 455 F.3d at 82 n.8.
[6] 28 C.F.R. §§ 570.21-.21 (July 1, 2005).

Additional litigation followed. In less than a year, two federal Circuit Courts invalidated the 2004-05 iteration of the 10% Rule.[7] The Second Circuit joined them in July 2006, the Tenth Circuit in 2007 and the Ninth Circuit joined in.[8] Only the First Circuit affirmed the BOP's claimed categorical exercise of discretion for designating inmates to community confinement; all others declared this version of the 10% Rule unlawful.[9]

B. **The Second Chance Act Directed Even Greater Use of Halfway Houses Than BOP Had Afforded Routinely Prior to the Unlawful 10% Rule.**

President George W. Bush made prisoner reentry a cornerstone of the 2004 State of the Union address, using the term "second chance." The following summer, the President reiterated this commitment and publicly declared a desire to assist the 600,000 men and women who are being released from prison each year: "Let's make sure we're the country of the second chance. Let's make sure people have got a chance to get an education and a job." President George W. Bush, Remarks by the President to the 2004 National Urban League Conference (July 23, 2004).

When the Second Chance Act of 2007 was passed in 2008, it included an amended version of section 3624, no doubt in response to the troubled revisions of practice since 2002. The law doubled the available time prisoners would be considered for pre-release community confinement (while providing that the BOP could place a prisoner on home confinement for up to six months or ten percent of the term of imprisonment) and stated also that nothing in the pre-release provisions of section 3624 could be interpreted to limit the BOP's complete designation discretion under section 621. The Act directed the BOP to issue regulations to "ensure that placement in a community correctional facility . . . is (A) conducted in a manner consistent with section 3621(b) of this title; (B) determined on an individual basis; and (C) of sufficient duration to provide the greatest likelihood of successful reintegration into the community." 18 U.S.C. sec. 3621(b)(6).

C. **Shifting BOP Guidance to Staff Indicates Less than Robust Exercise of Pre-release Discretion.**

Immediately following enactment of the Second Chance Act, the BOP issued a memorandum purporting to realign practice in light of the new mandates. Noting the changes in time frames, the emphasis on individualized determinations, and the repudiation of "categorical timeframe limitations" the memorandum nonetheless went on to express the agency's experience that a maximum pre-release placement of six months was sufficient to prepare an inmate for successful reentry.[10]

---

[7] *Fults v. Sanders*, 442 F.3d 1088 (8th Cir. 2006); *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235 (3d Cir. 2005).
[8] *Rodriguez v. Smith*, 541 F.3d 1180 (9th Cir. 2008); *Wedelstedt v. Wiley*, 477 F.3d 1160 (10th Cir. 2007); *Levine v. Apker*, *supra*
[9] See *Muniz v. Sabol*, 517 F.3d 29 (1st Cir. 2008).

[10] Memorandum from Joyce K. Conley, Assistant Dir. Corr. Programs Div. & Kathleen M. Kenney, Assistant Dir./Gen. Counsel to Chief Exec. Officers, Pre-Release Residential Re-Entry Center Placements Following the Second Chance Act of 2007 § III(D)(Apr. 14, 2008)[hereinafter Conley & Kenney Memo]

This memorandum was followed by one later the same year, setting out criteria for transferring prisoners to community confinement pursuant to its general authority to designate the place of imprisonment in section 3621.[11] The memorandum cautioned against telling prisoners that they were "ineligible" for transfer, given that the BOP had discretion under 18 U.S.C. section 3621 to transfer an inmate at any time to an RRC. Instead, the memo directed the staff to review a petition on its merits. The memo went on to caution, however, that staff is not to recommend more than six months in a halfway house unless the inmate presents "extraordinary or compelling circumstances justifying such placement, and the Regional Director concurs."[12]

A subsequent memorandum removed the requirement that the Regional director concur in a recommendation of transfer to community confinement earlier than six months, but otherwise did not change the requirement that such earlier transfers be justified by extraordinary or compelling circumstances.[13] This memorandum also pointed out that eligibility for 12 months in an RRC is not the same as appropriateness for transfer and added a new twist on limitations, appearing to tip the longer placement scales in favor of prisoners who are at a higher risk for recidivism.[14]

The de facto six-month rule was in turn purportedly based on BOP research. Former BOP Director Harley Lappin first revealed reliance on such research at a United States Sentencing Commission symposium on Alternatives to Incarceration in 2008. He asserted: "[O]ur research that we've done for many years reflects that may 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."[15] As revealed in litigation brought by Oregon prisoners challenging the rule, no such research exists. A staff memorandum secured in discovery, responding to the Director's statement, could not support the claim:

> I am trying to find out if there is any data to substantiate the length of time in a "halfway house" placement that 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.[16]

("While the [Second Chance] Act makes inmates eligible for a maximum of 12 months pre-release RRC placements, Bureau experience reflects inmates' pre-release RRC needs can usually be accommodated by a placement of six months or less. Should staff determine an inmates' pre-release RRC placement may require greater than six months, the Warden must obtain the Regional Director's written concurrence before submitting the placement to the Community Corrections Manager.").

[11] Memorandum from Kathleen Kenney and Joyce Conley, Memorandum for Chief Executive Officers regarding "Inmate Requests for Transfer to Residential Reentry Centers" (Nov. 14, 2008).

[12] *Id*. at 3.

[13] Memorandum from D. Scott Dodrill for Chief Executive Officers regarding "Revised Guidance for Residential Reentry Center (RRC) Placements," 2 (June 24, 2010) ("June 2010 memorandum")..

[14] Id. at 4.

[15] U.S.S.C., *Proceedings from the Symposium on Alternatives to Incarceration*, 267 (July 14-15, 2008).

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

D. Congress Continues to Urge the BOP to Use its Discretion to Make Reentry Release Widely Available.

The June 2010 memorandum, in explaining why it would seek to maximize RRC placements for high risk inmates, revealed one reason why the BOP is not making full use of its RRCs: "Our RRC resources are limited and must be focused on those inmates most likely to benefit from them in terms of anticipated recidivism reduction."[17]

Despite this concern, or perhaps because of it, Congress continues to express its intent that the BOP make robust use of community confinement and encouraged the BOP to seek money sufficient to fund it. In 2010 it expressed this sentiment in the Consolidated Appropriations Act of 2010:

> 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.[18]

Earlier this year, the committee report issued with the CJS Appropriations was even more direct on the subject:

> [T]he Committee is gravely concerned that the current upward trend in prison inmate population is unsustainable and, if unchecked, will eventually engulf the Justice Department's budgetary resources. The Committee notes that the Bureau possesses authorities through its operational discretion under 18 U.S.C section 3624 to, among other authorities, maximize the reentry time prisoners spend in residential reentry centers as well as home confinement; use its direct designation authority under 18 U.S.C. section 3621(b); expand the criteria for and use of compassionate release under 18 U.S.C. section 3582(c)(1)(A); and expand the use of the Residential Drug Abuse Program by removing barriers to full use of the program.[19]

E. BOP Full Use of Community Corrections Authority Will Save Taxpayer Money and Ease Overcrowding.

As Thomas Hillier points out in the Federal Public and Community Defenders Letter, the BOP can ease overcrowding of its facilities, presently 37% overcapacity, while saving resources that

---

[17] June 2010 memorandum at 1.
[18] 155 CONG. REC. at H13887
[19] S. Rep. No. 112-78, at 62 (2011).

can be directed to rehabilitation and other programs to enhance successful prisoner reentry and hence public safety.[20]

F. **Conclusion**

It is clear from the record that Congress intended the BOP to use its discretion to ensure that prisoners be considered for up to 12 months in reentry in the community, using RRCs and when possible, home confinement. Congressional repudiation of artificial and unlawful limits on the BOP's discretion could not be more clearly expressed. And yet, the proposed rule does not do anything to advance current practice, but merely restates the interim rule. Practice and policy under the interim rule include limitations on RRC placements to six months or less and further limitations for low risk inmates. Neither was contemplated by Congress. Congress repudiated categorical limitations and the rule should reinforce that intent. We urge the BOP to redraft the rule (and direct staff) to ensure that each prisoner is considered for the maximum amount of community reentry placement, both halfway house and home confinement. The proposed rule should expressly direct consideration of community confinement as a part of a reentry plan for periods that begin well before the six month date, to allow a natural and graduated transition from secure correctional custody to supervised releaseThe BOP should also repudiate *de facto* rules, including the extraordinary or compelling circumstances test for greater than six months placement in the community, as well as rules that purport to save lengthier halfway house stays for higher risk inmates. Neither is supported by Congress or committed to the discretion of the BOP, in light of the individualized considerations required under section 3621.

The Second Chance Act revised the reentry paradigm. Under the Act, the focus should be on maximizing each prisoner's period of reentry placement under home confinement (up to six months/10%) and then ensuring an additional preceding term of halfway house imprisonment for a total of up to one year in community custody prior to release.

Thank you for considering these views.

Sincerely,

Mary Price
Vice President and General Counsel

[20] Letter from Thomas W. Hillier, II, to Thomas R. Kane, 3-4 (Nov. 16, 2011) (pointing out that "enormous savings are available" by increasing halfway house time by even three months, the BOP could save $284.4 million every year.