

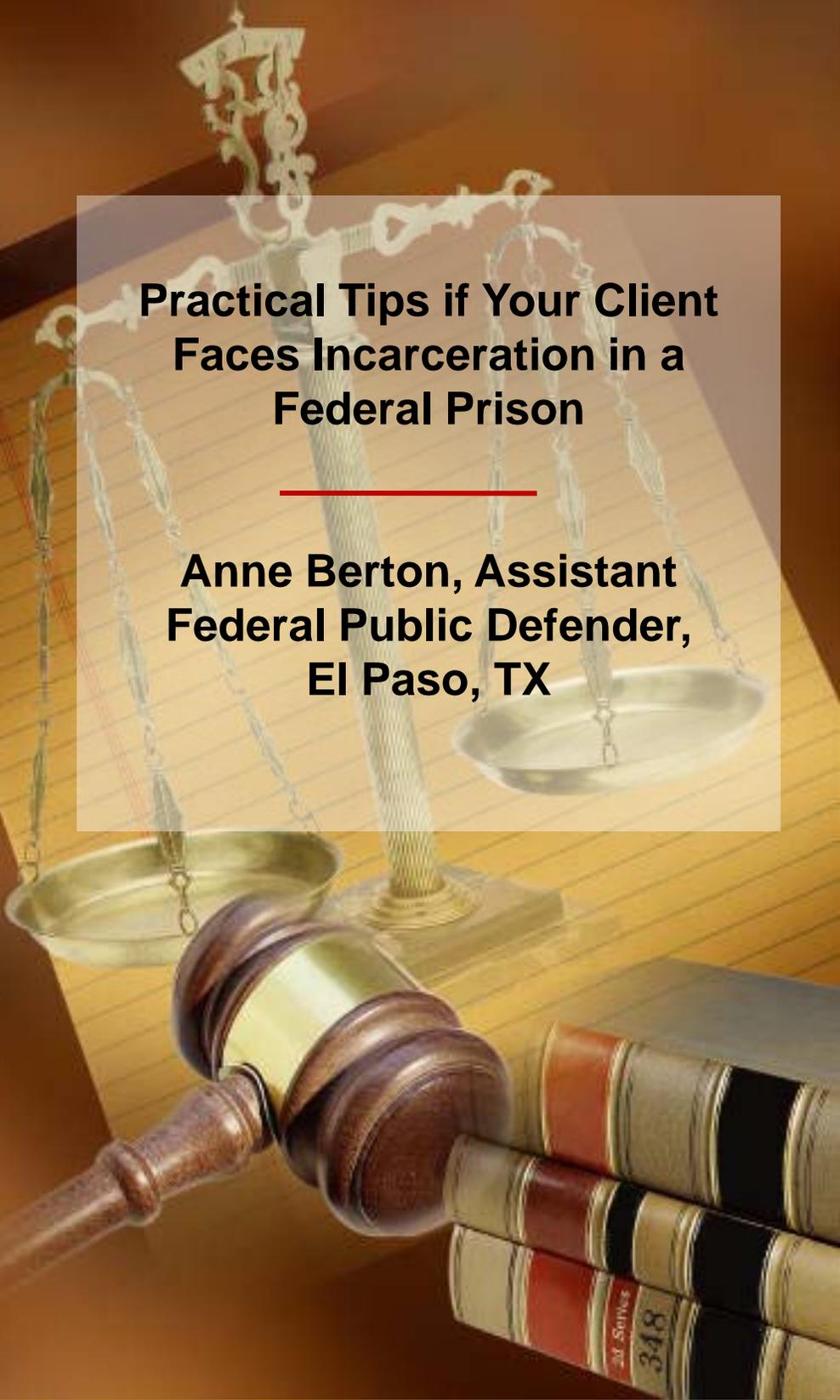
# SENTENCING

## ADVOCACY WORKSHOP

**Practical Tips if Your Client  
Faces Incarceration in a  
Federal Prison**

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**Anne Berton, Assistant  
Federal Public Defender,  
El Paso, TX**



# **Practical Tips if Your Client Faces Incarceration in a Federal Prison**

**By**

Anne T. Berton  
Assistant Federal Defender  
El Paso, Texas

and

Michael Gorman  
Research and Writing Specialist  
El Paso, Texas

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**PRACTICAL TIPS IF YOUR CLIENT FACES INCARCERATION  
IN A FEDERAL PRISON**

**I. INTRODUCTION**

The Bureau of Prisons (BOP) is charged with implementing the sentences imposed on federal offenders by the federal justice system and managing the facilities constructed for that purpose. Its 115 prisons, operated by both the federal government and private industry, address the range of possible security levels for the approximately 209,000 prisoners currently assigned to the BOP. The BOP also has responsibility for operating its administrative components, which include Federal Medical Centers conducting mental health evaluations for purposes of competency determinations and insanity defenses. Its role is therefore larger than post-judgment.

The majority of attorneys will however encounter the BOP through its involvement in prisoner placement and calculation of release dates after a guilty plea enters. While the BOP has substantial authority in placing prisoners and utilizing its computations on good time credit, the sentence it is charged with implementing remains the judgment of a federal court or the U.S. Parole Commission in Prisoner Treaty Transfer cases, and only those organizations may change the underlying judgment itself.

**II. BOP FACILITIES**

The Bureau of Prisons operates institutions of five different security levels (i.e., minimum, low, medium, high, and administrative). Security levels are based on such features as the presence of external patrols, towers, security barriers, or detection devices; the type of housing within the institution; internal security features; and the staff-to-inmate ratio.

The following is a brief description of BOP facilities, see U.S. Dep't of Justice, Bureau of Prisons, Prison Types & General Information (available at <http://www.bop.gov/locations/institutions/index.jsp>):

- A. Minimum Security: Also known as Federal Prison Camps (FPCs), these facilities have dormitory housing, a relatively low staff-to-inmate ratio, and little to no perimeter fencing. They are work- and program-oriented; and many are located adjacent to larger institutions or on military bases, where inmates help serve the labor needs of the larger institution or base.
- B. Low Security: Federal Correctional Institutions (FCIs) with double-fenced perimeters, typically dormitory or cubicle housing, and strong work and program components. The staff-to-inmate ratio in these institutions is higher than in minimum security facilities.
- C. Medium Security: FCIs (and U.S. Penitentiaries (USPs) designated as medium

security) with strengthened perimeters, such as double fences with electronic detection systems, largely cell-type housing, a wide variety of work and treatment programs, a higher staff-to-inmate ratio than low security FCIs, and even greater internal controls. Note there are no Medium security level institutions for female inmates.

- D. High Security: USPs with highly-secured perimeters (featuring walls or reinforced fences), multiple- and single-occupant cell housing, the highest staff-to-inmate ratio, and close control of inmate movement.
- E. Administrative: Administrative facilities have special missions, such as the detention of pretrial offenders; the treatment of inmates with serious or chronic medical problems; or the containment of extremely dangerous, violent, or escape-prone inmates. Administrative facilities include Metropolitan Correctional Centers (MCCs), Metropolitan Detention Centers (MDCs), Federal Detention Centers (FDCs), and Federal Medical Centers (FMCs), as well as the Federal Transfer Center (FTC), the Medical Center for Federal Prisoners (MCFP), and the Administrative-Maximum (ADX) U.S. Penitentiary. Administrative facilities are capable of holding inmates in all security categories.

### **III. INMATE CLASSIFICATION AND BOP DESIGNATION**

Prisoners are classified by the BOP according to procedures set forth in Program Statement P5100.08. *See* U.S. Dep't of Justice, Bureau of Prisons, Program Statement P5100.08 (Sept. 2006). All biographical data for a particular prisoner is entered into the BOP database system, SENTRY, which produces a security score based on individual characteristics entered. This score determines the minimum security level permitted, at which point an appropriate facility is identified typically within 500 miles of the release residence designated by the prisoner. The placement authorized by the security score may be overridden, to the benefit or detriment of the individual prisoner, by variables known as Public Safety Factors or Management Variables. A custody level is also assigned to each inmate within any given security level institution.

#### **A. SCORING**

Prisoner scoring utilizes the following data: (1) sentencing, (2) programing recommendations, (3) background information from the Judgment, (4) the Statement of Reasons (SOR), and (5) the PSR. Individual components of that score are:

(1) Voluntary Surrender<sup>1</sup>? No (0 points)      Yes (-3 points)

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<sup>1</sup>Only applies to cases in which prisoner was not escorted to prison for service of sentence, surrender occurred post-sentencing and surrender was not to U.S. Marshals on

- (2) Severity of Current Offense?<sup>2</sup>      Lowest (0 points)      Low Moderate (1 point)  
    Moderate (3 points)      High (5 points)  
    Greatest (7 points)
- (3) Criminal History Score in PSR<sup>3</sup>?    0-1 (0 points)    2-3 (2 points)    4-6 (4 points)  
    7-9 (6 points)    10-12 (8 points)    13+ (10 points)
- (4) Documented History of Violence  
     (minor/serious)<sup>4</sup>?      None (0 points/0 points)    >15 years (1 point/2 points)  
    10-15 years (1point/4 points)    5-10 years (3 points/6  
    points)    <5 years (5 points/7 points)
- (5) History of Escapes/Attempts?  
     (minor/serious)<sup>5</sup>?      None (0 points/0 points)    >15 years (1 point/3 points)  
    10-15 years (1 point/3 points)    5-10 years (2 points/3  
    points)    < 5 years (3 points/3 points)
- (6) Existing detainer<sup>6</sup>?      None (0 points)    Lowest/Low Moderate (1 point)  
    Moderate (3 points)    High (5 points) Greatest (7 points)
- (7) Age?     0-1 (0 points)    55+ (0 points)    36-54 (2 points)  
    25-35 (4 points)    <25 (6 points)

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sentencing date.

<sup>2</sup>Assigned values according to definitions for individual offenses set forth in the Offense Severity Scale found in Policy Statement 5100.08.

<sup>3</sup>The BOP directs that the score is taken first from the judgment or SOR, then from the PSR. If no criminal history score is provided, the BOP independently applies the scoring system used by the *Guidelines* for its inmate scoring entry.

<sup>4</sup>This category assesses whether a finding entered by judgment, revocation or disciplinary hearing indicating an act of violence. The severity is assessed by the underlying conduct, not by the particular finding.

<sup>5</sup>Escapes or attempted are graded as minor when involving minimal security and no violence or threat of violence and serious if from higher security and/or violence or a threat of violence.

<sup>6</sup>This category assesses any pending charges and assigns points based on the severity of the pending offense using the table used to assign points to the current offense.

(8) Education Level? High School Graduate/GED (0 points)  
 Progress on GED (1 point)  
 No Degree/Not Progressing (2 points)

(9) Drug/Alcohol Abuse? None/>5 years (0 points) <5 years (1 point)

The total of points assigned in these categories is the security score used for purposes of designation. Using the inmate’s Security Score and Custody Level (discussed below), available designations are defined in P5100.08 according to the following table

Security Level	Custody Level	Male	Female
MINIMUM	COMMUNITY and OUT	0-11 points	0-15 points
LOW	OUT and IN	12-15 points	16-30 points
MEDIUM	OUT and IN	16-23 points	*
HIGH	IN and MAXIMUM	24+ points	31+ points
ADMINISTRATIVE	All custody levels	All custody levels	All custody levels

**PRACTICAL TIPS:**

1. **Under Severity of Current Offense, points are assessed reflecting the most severe documented instant offense behavior regardless of the conviction offense. Make sure you fight to remove any behavior that is not properly documented! Do your best to remove language regarding such behavior from the PSR.**
2. **Under History of Violence, the severity of the act of violence is assessed by the underlying conduct, not by the finding or conviction. Make sure you fight to remove any behavior that is not properly documented! Do your best to remove language regarding such behavior from the PSR.**
3. **If there is a pending charge, points are added under Detainer based on the documented behavior. No points are added for ICE detainers.**
4. **The Education Level requires that the inmate’s education level be verified. Provide documentation to the probation officer if necessary.**

## **B. PUBLIC SAFETY FACTORS**

Separate from the above security score are Public Safety Factors (PSFs) that can individually effect designations. Up to three PSFs can be waived by the designation coordinator thereby giving an inmate the possibility of a lower security institution. The PSFs are as follows:

- (1) Sentence Length (males only). Unless waived, a male inmate with more than (1) ten years remaining to serve will be housed in at least a Low security level institution, (2) twenty years remaining will be housed in at least a Medium security level institution, and (3) thirty years remaining will be housed in at least a High security level institution.
- (2) Disruptive Group (males only). If validated as a member of a disruptive group, prisoner will be assigned a "High" security level.
- (3) Greatest Severity Offense (males only). If a current offense falls within the category of "Greatest Severity," prisoner may receive a minimum security level of "Low" unless waived.
- (4) Sex Offender. If the PSR or other official documentation "clearly indicates" behavior that may be characterized as a sex offense, prisoner may receive a minimum security level of "Low" unless waived.
- (5) Threat to Government Officials. If falling within this category, prisoner may receive a minimum security level of "Low" unless waived.
- (6) Deportable Alien. Prisoner may receive a minimum security level of "Low."
- (7) Violent Behavior (females only). A female inmate whose current term of confinement or history involves two convictions (or findings of commission of a prohibited act by the DHO) for serious incidents of violence within the last five years will be assigned to at least a Low security level institution unless waived.
- (8) Serious Escape. A female inmate who has been involved in a serious escape within the last ten years will be assigned to the Carswell Administrative Unit, unless the PSF has been waived. A male inmate who has escaped from a secure facility (prior or instant offense) with or without the threat of violence or who escapes from an open institution or program with a threat of violence will be housed in at least a Medium security level institution, unless the PSF has been waived.

- (9) Juvenile Violence. A male or female juvenile who has any documented instance of violent behavior, past or present, which resulted in a conviction, a delinquency adjudication, or finding of guilt.
- (10) Serious Telephone Abuse. If the PSR or other official documentation clearly indicates that telephone communications were used to facilitate crimes (drug trafficking, threats, acts of violence, etc.), then the inmate must be housed in at least a Low security level institution, unless the PSF is waived.
- (11) Prison Disturbance. A male inmate who was involved in a serious incident of violence within the institution will be housed in at least a High security level institution, unless the PSF is waived. A female inmate who was involved in a serious incident of violence within the institution will be housed in the Carswell Administrative Unit, unless the PSF has been waived.

#### **PRACTICAL TIPS:**

- 1. If an inmate is listed as being a member of a disruptive group, he can face an increased security level. Ask the court to remove any mention of a client's gang affiliation.**
- 2. The Sex Offender PSF can be applied based on behavior listed in the PSR or other official documentation. Make sure you fight to remove any behavior that is not properly documented! Do your best to remove language regarding such behavior from the PSR**

#### **C. MANAGEMENT VARIABLES**

Management Variables override the security level established by the security score. They may further override certain PSFs requiring higher security levels. Specific variables are as follows:

- (1) Judicial Recommendation. "When consistent with policies or when such actions are consistent with sound correctional management, the [BOP] attempts to satisfy judicial recommendations."
- (2) Release Residence. Directs placement within 500 miles of declared residence on release and may be used when prisoner is 36 months from scheduled release date.
- (3) Population Management. Permits assignment to facility inconsistent with security level due to, for example, population pressures affecting available appropriate-level bed space within 500 miles of the inmate's anticipated release residence; gang/security concerns.

- (4) Central Inmate Monitoring Assignment. Limitations on possible facilities based on special circumstances like the need to segregate from general population or special monitoring requirements.
- (5) Medical or Psychiatric. Applicable to those whose current or historical medical and psychological conditions require evaluation or treatment.
- (6) Program Participation. When an inmate's security level changes during participation in a special program not likely to be available in another appropriate facility, causing placement outside normal guidelines.
- (7) Work Cadre. At secure facilities without satellite camps, the Regional Director may authorize a certain number of work cadre inmates to perform work outside the perimeter of the institution.
- (8) PSF Waived. Up to 3 PSFs may be waived by designation coordinator.
- (9) Long-term Detainee. Permits increase or reduction in security level of facility based on observed prisoner conduct.
- (10) Greater Security. Catch-all provision for those prisoners whose characteristics result in a security score inadequately reflects security requirements.
- (11) Lesser Security. Catch-all provision for those prisoners whose characteristics result in a security score that overstates security requirements.

**PRACTICAL TIP: Provide the probation officer with medical records so that the client can receive the appropriate medical treatment.**

#### **D. CUSTODY LEVEL**

Within any given security level institution, a custody level is assigned to each inmate. There are four custody levels in each institution:

- 1) **COMMUNITY:** The lowest custody level. An inmate may be eligible for the least secure housing, including any which is outside the institution's perimeter, may work on outside details with minimal supervision, and may participate in community-based program activities if other eligibility requirements are satisfied.
- 2) **IN:** An inmate is assigned to regular quarters and is eligible for

all regular work assignments and activities under a normal level of supervision. Inmates are not eligible for work details or programs outside the institution's secure perimeter.

- 3) **OUT:** An inmate may be assigned to less secure housing and may be eligible for work details outside the institution's secure perimeter with a minimum of two-hour intermittent staff supervision.
- 4) **MAXIMUM:** This classification is for individuals who, by their behavior, have been identified as assaultive, predacious, riotous, serious escape risks, or seriously disruptive to the orderly running of an institution. Accordingly, quarters and work assignments are assigned to ensure maximum control and supervision.

An inmate's custody level within any given security level institution is routinely reviewed and may change for various reasons during the period of incarceration.

#### **IV. TRANSFER/RE-DESIGNATION**

Transfers, also referred to as redesignations, are used to place inmates in different institutions. Typical reasons for transfers include (1) institution classification, (2) nearer release, (3) disciplinary/close supervision, (4) adjustment, (5) medical/psychological treatment, (6) temporary transfers, (7) training purposes/program participation, (8) Institution Hearing Program, (9) pre-release and (10) transfers from CCC's.

Inmates may be considered for a nearer release transfer (moves the inmate closer to their legal residence or release destination) only after serving 18 consecutive months of clear conduct in a general population.

Essentially these transfers are based on a change in circumstances from the inmate's original designation, and proceeds in the same manner as the original designation process.

#### **V. EARLY RELEASE UNDER RESIDENTIAL DRUG ABUSE PROGRAM**

According to statute, "[t]he period a prisoner convicted of a nonviolent offense remains in custody after successfully completing a treatment program may be reduced by the Bureau of Prisons, but such reduction may not be more than one year from the term the prisoner must otherwise serve." 18 U.S.C.A. § 3621(e)(2)(B).

The BOP has implemented early release procedures for successful completion in a Residential Drug Abuse Program (RDAP) in Program Statement P5331.02 (Mar. 16, 2009).

This program applies to those inmates sentenced for a nonviolent offense with a diagnosed substance abuse disorder who successfully complete RDAP. The BOP interprets “successful completion” as (1) completion of the unit-based RDAP while in the institution, (2) if applicable, participation in follow-up treatment while in general population for 12 months or until release, whichever comes first, (3) completion of a community Transition Drug Abuse Treatment while residing in a Residential Reentry Center or on home confinement, and (4) comply with the Financial Responsibility Program.

The following inmates are considered by the BOP to be ineligible for RDAP:

- (1) alien detainees,
- (2) those in pretrial custody,
- (3) State or military inmates,
- (4) inmates with *prior* felony or misdemeanor conviction for homicide, forcible rape, robbery, aggravated assault, arson, kidnaping, or an offense that by its nature or conduct involves sexual abuse offenses committed upon minors,
- (5) Inmates who have a current felony conviction for an offense that has as an element, the actual, attempted, or threatened use of physical force against the person or property of another, an offense that involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives (including any explosive material or explosive device), an offense that, by its nature or conduct, presents a serious potential risk of physical force against the person or property of another; or an offense that, by its nature or conduct, involves sexual abuse offenses committed upon minors,
- (6) inmates who have been convicted of an attempt, conspiracy, or other offense which involved an underlying offense listed in (4) or (5) of this section; or
- (7) Inmates who previously received an early release under 18 U.S.C. § 3621(e).

These prohibitions, in short, deny RDAP to inmates with prior enumerated crimes of violence and current convictions that meet the definition of crime of violence set forth in 18 U.S.C. § 16. The eligibility for RDAP is a one-time deal if prior early release is granted.

## **VI. SEX OFFENDERS**

While a discussion of this topic requires more than a cursory reference, given the BOP’s role in registration, treatment and possible commitment, a brief summary of possible consequences is required.

The BOP has Program Statement 5141.02, Sex Offender Notification and Registration (Dec. 14, 1998), which provides for notification of local authorities for those with the “sex offender” PSF. The law has evolved substantially since this Program Statement.

In 2006, Congress enacted the Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. §§ 16901-16929. SORNA defines “sex offender” very broadly, creates a national sex offender database, requires that anyone who travels for more than a 3-day period update registration data with local authorities, and mandates in person verification of registry data, potentially for the rest of that individuals life. If one labeled a sex offender fails to update or register as required by SORNA, he or she faces a potential felony conviction under 18 U.S.C. § 2250. This process begins with the BOP’s identification of an individual as a sex offender and notification and acknowledgment of the registration requirements of SORNA.

Likely a larger problem, as it may prohibit a prisoner from ever departing federal custody, is civil commitment under 18 U.S.C. § 4248. Under that statute, if the BOP certifies that an inmate scheduled for release meets the definition of a “sexually dangerous person,” it may hold that inmate in custody, potentially indefinitely. This procedure was recently upheld by the Supreme Court in *United States v. Comstock*, 130 S. Ct. 1949 (2010). A “sexually dangerous person” is defined as a “person who has engaged or attempted to engage in sexually violent conduct or child molestation” and who “suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released.” 18 U.S.C. § 4247(a)(5) & (6). This definition is sufficiently broad to raise concerns as to how many may one day be swept in to indefinite civil commitment.

**PRACTICAL TIP: Be careful with the information provided by your client to the probation officer and any evaluations done on your client prior to sentencing! Any of this information can be used to civilly commit your client under the Adam Walsh Act.**

## **VII. THE BOP AND PRESENTENCE INVESTIGATION REPORTS**

When attorneys review their client’s Presentence Investigation Reports (PSRs), they may find themselves asking why the PSR provides what appears to be extraneous facts with little or no bearing on the sentence to be imposed. A minor entry in criminal history may be followed by paragraphs of details from arrest reports, while a major entry may be described in only a few lines. As United States Probation Offices are an arm of the court, by definition neutral in sentencing, it would seem PSRs should represent the complete and impartial facts intended for the court’s consideration in sentencing. That is not always the case.

As described by a former Probation Officer, the PSR is “like the Bible for the BOP. It extends way beyond the sentencing date.” Nancy Glass, *The Social Workers of Sentencing? Probation Officers, Discretion, and the Accuracy of Presentence Reports Under the Federal Sentencing Guidelines*, 46 No. 1 *Crim. Law Bulletin* Art. 2 (Jan.-Feb. 2010). Federal Rule of Criminal Procedure 32, governing sentencing, itself acknowledges that the PSR is submitted to the BOP. *See* FED. R. CRIM. P. 32(i)(3)(C)(providing “[a]t sentencing, the court . . . must append a copy of the court's determinations under this rule to any copy of the presentence report made available to the Bureau of Prisons”); see also *id.* Advisory Committee Notes to 1983 Amendment (providing

“If the defendant is incarcerated, the presentence report accompanies him to the correctional institution and provides background information for the Bureau of Prisons' classification summary, which, in turn, determines the defendant's classification within the facility, his ability to obtain furloughs, and the choice of treatment programs” and “the Bureau of Prisons and the Parole Commission make substantial use of the presentence investigation report. Under current practice, this can result in reliance upon assertions of fact in the report in the making of critical determinations relating to custody or parole”).

Given the substantial reliance on the facts contained in the PSR by the BOP, a critical role of the defense counsel in sentencing is insuring facts are both accurate and relevant to imposition of sentence. Alan Ellis, *Securing a Favorable Federal Prison Placement*, 30-APR Champion 22, 26 (2006). Failure to correct facts within the PSR, a record that remains with a prisoner long after a sentencing hearing is over, can have catastrophic long-term consequences. These consequences can include restrictions on facilities based on special offender characterizations, ineligibility for desired programs, and characterization as a “sex offender” — a label that may subject a defendant to civil commitment procedures after a criminal sentence has run its course. The prospects of correcting the factual record established by the PSR process after sentencing are grim, given the minimal obligation imposed on sentencing courts to correct the PSR. *See United States v. Saeteurn*, 504 F.3d 1175, 1179 (9th Cir. 2007)(concluding sentencing court need only resolve factual dispute involving “matters that will affect the determination and imposition of a correct sentence” and need not resolve “disputes that will affect only post-sentence decisions and the manner and location of service of the sentence”).

**PRACTICAL TIP:      MAKE SURE THE FACTS IN THE PSR ARE ACCURATE AND RELEVANT TO IMPOSITION OF THE SENTENCE.**

### **VIII. ROLE OF FEDERAL COURTS IN EXECUTION OF SENTENCE**

As previously stated, federal courts dictate the length of a term of imprisonment required by a federal sentence. The BOP, in turn, determines when a sentence commences. *See, e.g., United States v. Wells*, 473 F.3d 640, 645 (6th Cir. 2007)(stating that the BOP, not the district judge, will determine when a sentence commences). A federal judge may make recommendations to the BOP regarding when a sentence is to start and designation of a prison at which an inmate will serve a sentence, *see, e.g., United States v. Hayes*, 535 F.3d 907, 910 (8th Cir. 2008), but these are ultimately non-binding recommendations, not mandates to the BOP.

The BOP's determination of this date is established by statute: “A sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served.” 18 U.S.C. § 3585(a). Credit for time served is similarly determined by statute: “A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences-- (1) as a result of the offense for which the sentence was imposed; or (2) as a result



**PRACTICAL TIPS:**

- 1. IF YOUR CLIENT IS IN PRIMARY STATE CUSTODY (ON WRIT IN FEDERAL COURT), REQUEST THAT THE FEDERAL SENTENCING COURT ORDER THAT THE FEDERAL SENTENCE RUN CONCURRENTLY WITH THE STATE SENTENCE IN THE JUDGMENT BY STATING:**
  - A) “SAID SENTENCE TO RUN CONCURRENTLY WITH THE STATE SENTENCE THE DEFENDANT IS PRESENTLY SERVING.”**
  - B) “SENTENCE TO RUN CONCURRENTLY WITH SENTENCE IMPOSED UNDER DOCKET 168-88, SAN DIEGO COUNTY COURT, ON MAY 14, 1988.”**
  - C) “THAT THE DEFENDANT SERVE THIS SENTENCE AT THE STATE FACILITY, I.E., NEW MEXICO DEPARTMENT OF CORRECTIONS.”**
- 2. EVEN IF A FEDERAL JUDGE ORDERS THAT THE FEDERAL AND STATE SENTENCES RUN CONCURRENTLY, THEY WILL NOT RUN CONCURRENTLY IF THE STATE SENTENCE HAS ALREADY BEEN COMPLETED. IN THIS TYPE OF SITUATION, THE FEDERAL DEFENSE ATTORNEY SHOULD REQUEST A DEPARTURE OR VARIANCE FROM THE COURT REDUCING THE SENTENCE FOR THE AMOUNT OF TIME THE DEFENDANT WOULD HAVE BEEN CREDITED IF THE STATE AND FEDERAL SENTENCES WOULD HAVE RUN CONCURRENTLY.**
- 3. IF A FEDERAL SENTENCE IS ORDERED TO RUN CONCURRENTLY WITH A STATE SENTENCE IN WHICH THE STATE HAS PRIMARY CUSTODY, THE FEDERAL SENTENCE WILL NOT BEGIN TO RUN UNTIL THE DATE THE FEDERAL SENTENCE IS IMPOSED. THE FEDERAL SENTENCE WILL NOT BE CREDITED WITH ANY OF THE STATE TIME EARNED PRIOR TO THE DATE OF THE FEDERAL SENTENCING.**
- 4. REGARDLESS OF WHICH AUTHORITIES HAVE PRIMARY CUSTODIAL JURISDICTION, IF THE DEFENDANT IS SENTENCED IN STATE COURT PRIOR TO BEING SENTENCED IN FEDERAL COURT, THERE WILL LIKELY BE AN INCREASE IN THE DEFENDANT’S CRIMINAL HISTORY IN FEDERAL COURT. THUS, IF POSSIBLE, A DEFENDANT SHOULD BE SENTENCED IN FEDERAL COURT FIRST.**
- 5. REMEMBER THAT IF THE DEFENDANT IS RELEASED FROM THE CUSTODY OF THE AUTHORITY WITH PRIMARY CUSTODIAL JURISDICTION (FOR EXAMPLE, THE CHARGES ARE DISMISSED OR THE CLIENT IS RELEASED OUT ON BOND), PRIMARY CUSTODY MAY SHIFT TO THE OTHER AUTHORITY.**
- 6. IF THE FEDERAL TERM EXPIRES PRIOR TO THE INMATE’S RELEASE FROM THE NON-FEDERAL JURISDICTION, A TERM OF SUPERVISED RELEASE THAT FOLLOWS**

**A FEDERAL SENTENCE WILL NOT COMMENCE UNTIL THE INMATE IS RELEASED FROM ALL PERIODS OF CONFINEMENT.**

- 7. KEEP IN MIND. THE COURT MAY, FROM TIME TO TIME, ORDER CONCURRENT SERVICE OF THE FEDERAL SENTENCE AT SOME TIME AFTER ITS IMPOSITION IF FOR INSTANCE, PRIMARY JURISDICTION RESIDED WITH THE STATE AND THE COURT MISTAKENLY BELIEVED THAT THE INMATE WAS IN FEDERAL CUSTODY FOR SERVICE OF THE FEDERAL SENTENCE ON THE DATE OF IMPOSITION. (SEE SECTION 9 OF PROGRAM STATEMENT 5160.05.)**

## **X. GOOD CONDUCT TIME/GOOD TIME CREDIT**

For sentences involving terms of imprisonment of more than 1 year, the BOP is authorized to award good conduct time, also referred to as good time credit, of up to 54 days if it finds the “prisoner has displayed exemplary compliance with institutional disciplinary regulations.” 18 U.S.C.A. § 3624(b)(1). If the BOP finds a prisoner’s compliance is less than exemplary, it is authorized to award no credit or lesser credit.

The details of the BOP’s implementation of the good time credit provision are found in both regulation, *see* 28 C.F.R. § 523.20,<sup>7</sup> and BOP Program Statements, *see* Program Statement 5880.28 and Program Statement P5884.03 (Mar. 31, 2006). As the name suggests, any award of good time credit that has not vested may be reduced or eliminated for disciplinary issues. While these proceedings are beyond the scope of this paper, details may be found in 28 C.F.R. § 541.13.

There are three different rules applied to determine good time credit based on the date of offense conduct for which a prisoner was sentenced. These rules are set forth as follows:

- (1) For offenses committed on or after November 1, 1987, but before September 13, 1994, the BOP awards 54 days credit for each year served. This amount is prorated when the time served is less than a full year. Once good time credit vests, it cannot be disallowed.
- (2) For offenses committed on or after September 13, 1994, but before April 26, 1996, inmates earn up to 54 days credit at the end of each full year if they have earned, or are making satisfactory progress toward earning, a GED.
- (3) For inmates serving a sentence for an offense committed on or after April 26, 1996, the BOP awards 54 days credit for each year served (or a prorated amount when the time

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<sup>7</sup>The Ninth Circuit invalidated this regulation based on a technical failure to articulate a rational basis for the BOP’s interpretation of § 3624 as required by the Administrative Procedures Act. *Tablada v. Thomas*, 533 F.3d 800, 809 (9th Cir. 2008). It nonetheless deferred to the BOP’s longstanding interpretation through its Program Statement.

served is less than a full year) if the inmate has earned or is making satisfactory progress toward earning a GED credential or high school diploma. The BOP awards a maximum of 42 days credit for each year served (or a prorated amount for a period of less than a year) if the inmate has not earned or is not making satisfactory progress toward earning a GED credential or high school diploma.

(4) Under rules (2) and (3), an alien subject to a final order of removal is not required to participate in literacy/GED programs to receive the full award of good time credit.

If an inmate disagrees with an assessment on good time credit, he or she must challenge the assessment using the Administrative Remedy Program, 28 CFR §§ 542.10-542.19.

#### **PRACTICAL TIPS:**

- 1. MAKE SURE THE PSR ACCURATELY REFLECTS YOUR CLIENT’S EDUCATIONAL HISTORY, INCLUDING IF HE HAS EARNED A GED CREDENTIAL OR A HIGH SCHOOL DIPLOMA.**
- 2. YOU MIGHT WANT TO CONSIDER ASKING FOR A VARIANCE IN CASES INVOLVING LENGTHY SENTENCES BASED ON THE FACT THAT BOP CALCULATES GOOD TIME CREDIT BASED ON PRISON TIME SERVED RATHER THAN THE SENTENCE IMPOSED. IN *BARBER V. THOMAS*, IN WHICH THE UNITED STATES SUPREME COURT RECENTLY UPHELD THE BOP’S METHOD OF CALCULATING GOOD-TIME CREDIT, JUSTICE BREYER WROTE” “[I]F IT TURNS OUT THAT THE CALCULATION OF GOOD TIME CREDIT BASED ON PRISON TIME SERVED RATHER THAN THE SENTENCE IMPOSED PRODUCES RESULTS THAT ARE MORE SEVERE THAN THE COMMISSION FINDS APPROPRIATE, THE COMMISSION REMAINS FREE TO ADJUST SENTENCE LEVELS ACCORDINGLY.” No. 09-5201, 2010 WL 2243706, AT \*9 (U.S. JUNE 7, 2010).**

## **XI. SECOND CHANCE ACT**

On April 28, 2008, the President signed into law the Second Chance Act of 2007, 18 U.S.C. § 3624. was signed into law to improve the outcomes for people returning to communities from prisons and jails. This legislation authorizes federal grants to government agencies and nonprofit organizations to provide programs and services to help reduce recidivism.

### **A. APPROPRIATIONS**

In fiscal year 2010, \$144 million were appropriated for prisoner reentry programs, including reentry initiatives in the Federal Bureau of Prisons and Second Chance grant programs:

- \* Reentry demonstration projects under Sec. 101
- \* Mentoring grants to nonprofit organizations under Sec. 211

- \* Reentry Courts under Sec. 111
- \* Family-based, substance abuse treatment under Sec. 113
- \* Grants to evaluate and improve education in prisons, jails, and juvenile facilities under Sec. 114
- \* Technology career training demonstration grants under Sec. 115
- \* Reentry Substance Abuse and criminal justice collaboration under Sec. 201
- \* Reentry research under Sec. 245

## **B. PRERELEASE CUSTODY UNDER SEC. 251**

This Act permits eligible inmates to spend some portion of the **final twelve months** of their sentence in a community correctional facility, also known as a half-way house or residential reentry center.

“The Director of the Bureau of Prisons shall, to the extent practicable, ensure that a prisoner serving a term of imprisonment spends a portion of the final months of that term (not to exceed 12 months), under conditions that will afford that prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community. Such conditions may include a community correctional facility.” *Id.* § 3624(c)(1). This authority “may be used to place a prisoner in home confinement for the shorter of 10 percent of the term of imprisonment of that prisoner or 6 months.” *Id.* § 3624(c)(2).

It should be noted that § 3624 expressly does not override the BOP’s authority to designate an appropriate facility, thus a prisoner must meet general eligibility requirements discussed above for these placements.

The regulation implementing this mandate provides that “[i]nmates may be designated to community confinement as a condition of pre-release custody and programming during the final months of the inmate's term of imprisonment, not to exceed twelve months.” 28 C.F.R. § 570.21(a). This regulation also provides for “home detention as a condition of pre-release custody and programming during the final months of the inmate's term of imprisonment, not to exceed the shorter of ten percent of the inmate's term of imprisonment or six months.”

Pursuant to the Second Chance Act, the BOP staff is required to review inmates for RRC placement 17-19 months before their projected release date, and inmates are to be individually considered using the five factors listed in §3621(b).

## **C. ELDERLY INMATE PILOT PROGRAM UNDER SEC. 231**

Pursuant to the Second Chance Act, the Attorney General was directed to conduct a pilot program to determine the effectiveness of removing eligible elderly offenders from a Bureau of Prisons facility and placing such offenders on home detention until their term of confinement has expired. 42 U.S.C. §17451(g)(1)(A).

To be eligible for the Elderly Inmate Pilot Program, offenders must satisfy two sets requirements in addition to the requirement that the offender must be not less than 65 years of age:

- (1) the offender must be serving a term of imprisonment other than life imprisonment based on a conviction for an offense or offenses that do not include any crime of violence, sex offenses, or other offenses enumerated in the statute;
- (2) the offender must have served greater of 10 years or 75% of the term of imprisonment imposed at sentencing;
- (3) the offender must not have been convicted in the past of any Federal or State crime of violence, sex offense, or other offense enumerated in the statute.
- (4) the offender must not have been determined by the BOP to have a history of violence or of sex offenses or the other offenses described in the statute;
- (5) the offender must not have escaped or attempted to escape from a BOP institution;
- (6) the BOP must determine that release of the offender to home detention will result in a substantial net reduction of costs to the federal government; and
- (7) the BOP must determine that the offender poses no substantial risk of engaging in criminal conduct or of endangering any person if released to home detention.

42 U.S.C. §17541(g)(5) (A)(I-vii).

## **XII. CONCLUSION**

It is hoped these topics are informative and provide a basic understanding of the role of the BOP and considerations that may limit the time a client spends in custody. For specific issues, it is best to consult the individual Program Statements found on the BOP's Web site (<http://www.bop.gov/>). Typically, items of interest to attorneys would be found in the 5000 series Program Statements.

# PRACTICAL TIPS IF YOUR CLIENT FACES INCARCERATION IN A FEDERAL PRISON

ANNE T. BERTON  
ASSISTANT FEDERAL PUBLIC DEFENDER  
WESTERN DISTRICT OF TEXAS  
700 E. SAN ANTONIO AVE., SUITE D-401  
EL PASO, TEXAS 79912  
(915) 534-6525



**USP ALCATRAZ  
(1934-1963)**





# FEDERAL BUREAU OF PRISONS (BOP)

Consists of:

- More than 110 institutions
- Six Regional Offices
- Designation and Sentence Computation Center
- Central Office (headquarters) in D.C.
- Approximately 30 community corrections offices

# QUICK FACTS ABOUT BOP POPULATION

- TOTAL POPULATION: 211,338
- BOP FACILITIES: 172,954
- PRIVATE CONTRACT: 24,277
- OTHER CONTRACT FACILITIES: 14,107

COMMUNITY CORRECTIONS  
CENTERS, HOME CONFINEMENT, ETC.

DATED 6/26/2010

# SENTENCE IMPOSED

Less than 1 year:	3,587	(1.8%)
1-3 year:	24,132	(12.3%)
3-5 years:	28,464	(14.5%)
5-10 years:	58,325	(29.7%)
10-15 years:	39,700	(20.2%)
15-20 years:	17,258	(8.8%)
More than 20 years:	18,864	(9.6%)
Life:	6,076	(3.1%)
Death:	55	

# INMATES BY GENDER

- MALE: 197,383 (93.5%)

- FEMALE 13,726 (6.5%)

AVERAGE INMATE AGE: 38

# FIVE DIFFERENT SECURITY LEVELS

- MINIMUM SECURITY
- LOW SECURITY
- MEDIUM SECURITY
- HIGH SECURITY
- ADMINISTRATIVE

# MINIMUM SECURITY

- Federal prison camps (FPC's)
- Dormitory housing
- Relatively low staff-to-inmate ratio
- Work- and program –oriented
- Many located adjacent to larger institutions or on military bases



FPC ALDERSON



**FPC ALDERSON**



# LOW SECURITY

- Federal Correctional Institutions (FCIs)
- Double-fenced perimeters
- Typically dormitory or cubicle housing
- Strong work and program components
- Staff-to-inmate ratio is higher than in minimum-security facilities



FCI SANDSTONE

# MEDIUM SECURITY

- Federal Correctional Institutions (FCIs) and USPs designated to house medium security inmates
- Strengthened perimeters such as double fences with electronic detection systems
- Largely cell-type housing
- Wide variety of work and treatment programs
- Higher staff-to-inmate ratio than low-security FCIs
- Even greater internal controls



FCI ALLENWOOD

# HIGH SECURITY

- United States Penitentiaries (USPs)
- Highly-secured perimeters (featuring walls or reinforced fences)
- Multiple- and single-occupant cell housing
- Highest staff-to-inmate ratio
- Close control of inmate movement



USP FLORENCE

# ADMINISTRATIVE

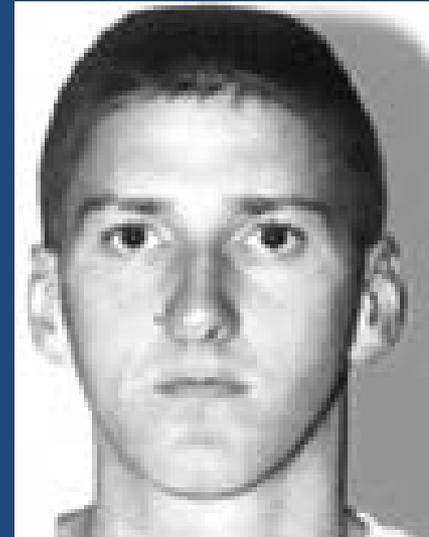
Institutions with special missions, such as detention of pretrial offenders; treatment of inmates with serious or chronic medical problems; or containment of extremely dangerous, violent, or escape-prone inmates.

# ADMINISTRATIVE

- Includes:
  - Metropolitan Correctional Centers (MCCs)
  - Metropolitan Detention Centers (MDCs)
  - Federal Detention Centers (FDCs)
  - Federal Medical Centers (FMCs)
  - Federal Transfer Center (FTC)
  - Medical Center for Federal Prisoners (MCFP)
  - Administrative-Maximum (ADX) U.S. Penitentiary
- Capable of holding inmates in all security categories



FMC BUTNER



**USP FLORENCE ADMAX**

# MEDICAL SERVICES

Medical, dental, and mental health services are provided at all BOP institutions.

# FOUR CARE LEVELS

Inmates are assigned a medical CARE Level based on their medical background described in the PSR and other available information.

- Level 1- Generally healthy and under 70
- Level 2- Stable outpatients (diabetes, epilepsy, etc.)
- Level 3- Fragile outpatients (cancer in remission, end-stage liver disease, etc.)
- Level 4- Severely impaired, may require daily nursing care (cancer in active treatment, dialysis, etc.)

# FEDERAL MEDICAL REFERRAL CENTERS (FMCs)

The following FMCs provide specialized health services:

- FMC Butner, North Carolina
- FMC Carswell, Forth Worth, Texas (for women)
- FMC Devens, Massachusetts
- FMC Lexington, Kentucky
- FMC Rochester, Minnesota
- U.S. Medical Center for Federal Prisoners (USMCFP), Springfield, Missouri

# SECOND CHANCE ACT OF 2007

- Signed into law in April 2008
- To reduce recidivism
- Permits eligible inmates to spend some portion of the final twelve months of their sentence in a residential reentry center (RRC) also known a half-way house
- Eligible inmates may be placed in home confinement for the shorter of 10 % of the term of imprisonment or 6 months

- (1) In general. The Director of the Bureau of Prisons shall, to the extent practicable, ensure that a prisoner serving a term of imprisonment spends a portion of the final months of that term (not to exceed 12 months), under conditions that will afford that prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community.
- (2) Home confinement authority. The authority under this subsection may be used to place a prisoner in home confinement for the shorter of 10 percent of the term of imprisonment of that prisoner or 6 months.

18 USC §3624 (c)

# RRC PLACEMENT

- BOP staff are required to review inmates for RRC placement 17-19 months before their projected release dates
- BOP must determine placement on an individual basis

HOW DO OUR CLIENTS GET  
DESIGNATED TO A BOP FACILITY?

# DESIGNATION AUTHORITY

- Title 18 USC Section §3621 authorizes the BOP to designate where a prisoner will serve his or her sentence
- Prisoners are classified by the BOP according to procedures set forth in Program Statement 5100.08, Inmate Security Designation and Custody Classification

# DESIGNATION AND SENTENCE COMPUTATION CENTER (DSCC)

Responsible for :

- Initial custody classification
- Assignment of an inmate's BOP management variables and public safety factors
- Designation
- For all transfers
- For all sentence calculations

# SUMMARY OF AN INITIAL DESIGNATION

1. After an inmate is sentenced, the clerk of the court transmits the judgment to the USMS.
2. The USMS requests a designation from the Designation and Sentence Computation Center (DSCC).
3. If it has not already been provided, the DSCC staff will contact the court, probation or USMS for copies of the: PSR, judgment, SOR, and Individual Custody and Detention Report (USM-129).

# SUMMARY OF AN INITIAL DESIGNATION

4. DSCC staff will load all data into the Inmate Load and Security Designation form for a particular prisoner into the BOP database system called SENTRY.
5. The DSCC will ordinarily complete the initial designation within 3 working days of receiving all the necessary documentation.



4. Documented History of Violence-  
minor/serious
5. History of Escape/Attempts- minor/serious
6. Detainers-based on severity of pending case
7. Age:      55 and over (0 pts)    25-35 (4 pts)  
                 36-54 (2 pts)                    24 or less (8 pts)

8. Education Level:

HS grad/GED (0 pts) Progress GED (1 pt)

No Degree (2 pts)

9. Drug/Alcohol Abuse:

Never/Not used in over 5 years (0 pts)

Used within last 5 years (1 pts)

# SECURITY SCORE LEVEL

May be overridden by:

- Public Safety Factors

- Management Variables

# PUBLIC SAFETY FACTORS

There are 9 Public Safety Factors which are applied to inmates who are not appropriate for placement at an institution which would permit inmate access to the community (i.e. minimum security).

# PUBLIC SAFETY FACTORS (PSFs)

1. Sentence Length (males only)-10 low, 20 med, 30 high
2. Disruptive Group
3. Greatest Severity Offense (males only)
4. Sex Offender-documents indicate behavior
5. Threat to Govt Officials
6. Deportable Alien-maybe low
7. Violent Behavior (females only)
8. Serious Escape
9. Juvenile Violence
10. Serious Telephone Abuse
11. Prison Disturbance

# MANAGEMENT VARIABLES

- A management variable is required when placement has been made and/or maintained at an institution level inconsistent with the inmate's scored security level.
- Management variable may override certain PSFs required higher security levels.

# MANAGEMENT VARIABLES

1. Judicial Recommendation
2. Release Residence-directs placement w/in 500 miles of declared residence
3. Population Management
4. Central Inmate Monitoring Assignment-limitations on facilities based on need to segregate or special monitoring requirements
5. Medical or Psychiatric-documentation may reflect need for FMC
6. Program Participation
7. Work Cadre
8. PSF Waived-up to 3 PSFs may be waived
9. Long-term Detainee
10. Greater Security
11. Lesser Security

# CUSTODY LEVELS

- Within any given security level institution, a custody level is assigned to each inmate.
- There are four custody levels in each institution: Community, IN, OUT, MAXIMUM

# CUSTODY LEVELS

- **COMMUNITY:**  
Lowest custody level. May be eligible for least secure housing, incl any which is outside perimeter, may work on outside details with minimal supervision, and may participate in community –based program activities if eligible.
- **IN:**  
Assigned to regular quarters and is eligible for all regular work assignments and activities under normal level of supervision. Inmates not eligible for work details or programs outside the institution's secure perimeter.

# CUSTODY LEVELS

- **OUT:**  
May be assigned to less secure housing and may be eligible for work details outside institution's secure perimeter with minimum of 2 hr intermittent staff supervision.
- **MAXIMUM:**  
For individuals who, by their behavior, have been identified as assaultive, predacious, riotous, serious escape risks, or seriously disruptive to the orderly running of an institution. Quarters and work are assigned to ensure maximum control and supervision.

# SECURITY SCORE AND CUSTODY LEVEL TABLE

<b>Security Level</b>	<b>Custody Level</b>	<b>Male</b>	<b>Female</b>
MINIMUM	COMMUNITY and OUT	0-11 points	0-15 points
LOW	OUT and IN	12-15 points	16-30 points
MEDIUM	OUT and IN	16-23 points	*
HIGH	IN and MAXIMUM	24+ points	31+ points
ADMINISTRATIVE	All custody levels	All custody levels	All custody levels

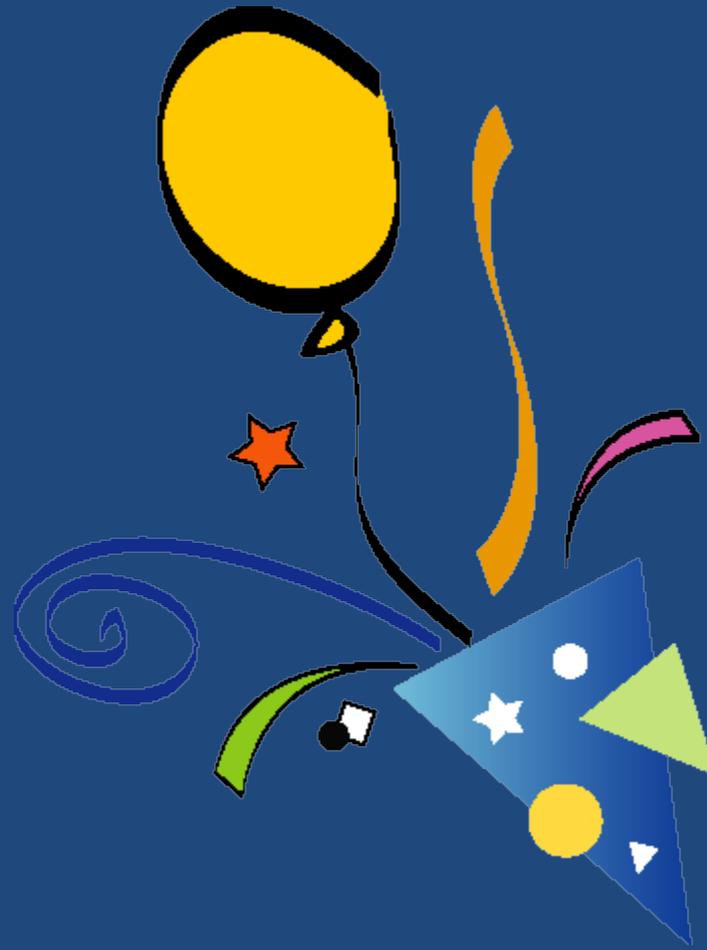
# INMATES BY SECURITY LEVEL

- MINIMUM: 16.9%
- LOW: 38.2%
- MEDIUM: 29.6%
- HIGH: 11.0%
- UNCLASSIFIED 4.2%

Dated 6/26/2010

# ISSUES REGARDING SENTENCE COMPUTATION

# GOOD TIME CREDIT



# GOOD TIME CREDIT

- For sentences of imprisonment of more than 1 year, the BOP is authorized to award good time credit, of up to 54 days per year served.  
18 USC §3624 (b)
- Inmates sanctioned for violating prison disciplinary rules may lose all or part of these credits

- For inmates serving a sentence for an offense committed on or after April 26, 1996, BOP awards 54 days credit for each year served if the inmate has earned or is making satisfactory progress toward earning a GED or high school diploma.
- BOP awards a maximum of 42 days credit for each year served if the inmate has not earned or is not making satisfactory progress toward earning a GED credential or high school diploma.
- An alien subject to removal, is not required to participate in literacy/GED programs to receive full award of good time credit.

# PRACTICAL TIPS FOR GOOD TIME CREDIT

- Make sure PSR accurately reflects educational history
- Consider asking for variance in cases involving lengthy sentences based on fact that BOP calculates good time credit based on prison time served rather than the sentence imposed. See Barber v. Thomas, 2010 WL 2243706 (U.S. June 7, 2010)

# DESIGNATION OF STATE INSTITUTION FOR SERVICE OF FEDERAL SENTENCE



# DESIGNATION OF STATE INSTITUTION FOR SERVICE OF FEDERAL SENTENCE

- Consistent with its statutory authority to designate the place of confinement, the BOP may designate a state facility. 18 USC §3621(C)
- By default, a sentence runs consecutively with any previously imposed sentence, whether state or federal. 18 USC §3584

- If a federal sentencing court orders that a sentence run concurrently with a state sentence already imposed, BOP implements that order ordinarily by designating the state facility as the place to serve the federal sentence.
  1. The federal sentence does not begin until the day the federal sentence is imposed.
  2. The federal sentence will not run concurrently with the portion of the state sentence that has already been discharged/served.

- Interaction of Federal and State Sentences when the Federal Defendant is Under State Primary Jurisdiction by Henry J. Sadowski, Regional Counsel Northeast region.
- See Program Statement 5160.05, Designation of State Institution for Service of Federal Sentence.

# PROGRAMS AFFECTING DESIGNATION AND RELEASE

# BOP DRUG ABUSE TREATMENT PROGRAMS

1. Drug Abuse Education Course (DRUG ED)
2. Non-Residential Treatment Program (NR DAP)
3. Residential Drug Abuse Program (RDAP)
4. Self-help programs: AA, NA, RR

# DRUG ABUSE EDUCATION COURSE (DRUG ED)

- Available to all inmates minus those that do not have enough time remaining or completed RDAP
- Volunteers or required if evidence that alcohol or other drug use contributed to offense or returned to custody as a violator due to use
- Purpose is to inform inmates drug/alcohol abuse consequences and to motivate inmates to volunteer for additional treatment
- Course usually provided within first 12 months of commitment
- Course is 12 to 15 months in duration

# NON –RESIDENTIAL DRUG ABUSE TREATMENT PROGRAMS (NR DAP)

- Available to all inmates
- Targeted to inmates waiting for RDAP, do not meet criteria for RDAP, etc.
- Course is 90 to 120 minutes per week for 12 to 24 weeks
- Purpose is provide all inmates with drug problem the opportunity to receive drug treatment

# NR DAP INCENTIVES

Achievement Awards for successful completion of NR DAP:

- Up to \$30
- **Wardens are strongly encouraged to approve inmates for the maximum period of RRC placement**
- Incentives like books, t-shirts, greeting cards, notebooks, pens, etc.

# RESIDENTIAL DRUG ABUSE PROGRAM (RDAP)

**BUREAU OF PRISONS RESIDENTIAL DRUG ABUSE PROGRAM REFERENCE CHART - Residential Drug Abuse Treatment Program (RDAP)**

Eligibility Requirements*o	Disqualifiers*o	Incentives*	Program Cessation*o	Structure*o	Early Release (ER)♦†o
<p>To qualify for admission, prisoners must:</p> <ol style="list-style-type: none"> <li>1. Have a documented and verifiable substance abuse disorder consistent with the American Psychiatric Association per the DSM</li> <li>2. Disorder must be within the 12-months prior to arrest;</li> <li>3. Sign program agreement</li> <li>4. Be able to complete all three components of program (see "Structure")</li> <li>5. Ordinarily* have at least 24 months remaining on sentence</li> </ol> <p><u>Note:</u> documentation can be shown through (a) probation or parole officer; (b) substance abuse treatment provider; (c) multiple recent DUI/DWI convictions; if prisoners lacks verifying documentation but have physical proof, such as track marks or abscesses, they may consent to drug treatment staff receiving medical staff's examination results</p>	<p>Prisoners are <u>not eligible if:</u></p> <ol style="list-style-type: none"> <li>1. Insufficient time remaining on sentence</li> <li>2. language barriers prohibit sufficient communication</li> <li>3. cognitive impairment precludes meaningful participation</li> </ol> <p><u>Note:</u> disabled prisoners may still qualify so long as they are otherwise qualified and able to fully participate</p>	<p>Prisoners may earn <u>the following incentives for participation if eligible (based on financial program responsibility and GED compliance):</u></p> <ul style="list-style-type: none"> <li>• Financial awards</li> <li>• Maximum time in community program</li> <li>• Preferred living quarters</li> <li>• Early release pursuant to 18 U.S.C. § 3621(e)</li> <li>• Transfer to facility closer to family</li> <li>• Achievement awards</li> <li>• Photographs of ceremonies sent to families</li> </ul> <p><u>Note:</u> if a prisoner discontinues RDAP, he or she may lose incentives.</p>	<p>Prisoners may discontinue <u>in the program by:</u></p> <ol style="list-style-type: none"> <li>1. Voluntary withdrawal</li> <li>2. Possible expulsion due to disruptive behavior or confidentiality violation</li> <li>3. Mandatory expulsion if Discipline Hearing Officer finds prisoner has (a) drug or alcohol violation; (b) violence or threat of; (c) escape or attempt; or (d) 100-level series incident</li> </ol> <p><u>Note:</u> removal or withdrawal can result in (a) transfer to prior institution; (b)ineligibility for non-emergency furlough; performance, vacation, or bonus pay; work program; rewards</p> <p><u>Also note:</u> prisoners may re-apply for the program; however, no credit is given for prior participation</p>	<p>Prisoners must <u>complete each phase of the treatment, including</u></p> <ol style="list-style-type: none"> <li>1. Unit-Based Component (involving at least 6 months in special unit and 500 hours of activities)</li> <li>2. Follow-up Services (if time allows between unit program and TDAT) and</li> <li>3. Transitional Drug Abuse Treatment (TDAT) (community drug treatment program) (for a minimum of one hour per month for a minimum of 120 days)</li> </ol>	<p>Pursuant to 18 U.S.C. § 3621(e), prisoners may be eligible for early release if they:</p> <ol style="list-style-type: none"> <li>1. Have a substantiated substance abuse disorder</li> <li>2. Were imprisoned for a nonviolent offense</li> <li>3. Successfully completed RDAP, follow up, and TDAT</li> <li>4. Are compliant with Financial Responsibility Program</li> </ol> <p><u>Per the BOP Director's discretion, prisoners may not be eligible for ER if they are/have been:‡</u></p> <ol style="list-style-type: none"> <li>1. ICE Detainees/Pretrial prisoners/Contractual boarders</li> <li>2. <i>Previously</i> convicted of either a misdemeanor or felony for (a) homicide, (b) forcible rape, (c) robbery, (d) aggravated assault, (e) arson, (f) kidnaping, or (g) sexual abuse against a minor‡</li> <li>3. <i>Currently</i> convicted of a felony for an offense involving (a) as an element the actual, attempted, or threatened use of physical force against the person or property of another; (b) carrying, possession, or use of a firearm, dangerous weapon, or explosives; (c) a serious potential risk of physical force against a person or property of another; or (d) sexual abuse committed upon a minor**</li> <li>4. <i>Previously</i> convicted of attempt, conspiracy, or other offense listed above in subsection 2 or 3</li> <li>5. A designated felon with an enhanced base level in the Sentencing Guidelines for use/threatened use of force or for which a specific offense characteristic was applied for possession of weapon or use of force was implicated†</li> <li>6. <i>Previously</i> received early release pursuant to § 3621(e)</li> <li>7. Lodged with a detainer that prevents completion of RDAP</li> </ol> <p><u>Early Release (ER) reduction:</u></p> <ul style="list-style-type: none"> <li>• If sentence length is 30 months or less, ER cannot exceed 6 months</li> <li>• if sentence is 31-36 months, ER no more than 9 months</li> <li>• if sentence is 37 months or more, ER no more than 1 year.</li> </ul>
<p>*See <i>Psychology Treatment Programs</i> Program Statement, 5330.11(effective 3/16/09) <a href="http://www.bop.gov">www.bop.gov</a>          ♦ See <i>Early Release Procedures Under 18 U.S.C. § 3621 (e)</i> Program Statement, 5331.02 (effective 3/16/09) <a href="http://www.bop.gov">www.bop.gov</a>          †See <i>Categorization of Offenses</i> Program Statement, 5162.05 (effective 3/16/09) <a href="http://www.bop.gov">www.bop.gov</a>          o See 28 C.F.R. § 550.53-56 (2009)</p>					
<p>** Categorical exclusion from eligibility for prisoners with convictions for firearms possession and crimes of violence were found invalid in the 9<sup>th</sup> Circuit. <i>Arington v. Daniels</i>, 516 F.3d 1106 (9th Cir. 2008); <i>Crickon v. Thomas</i>, 579 F.3d 978 (9th Cir. 2009).          ‡ Courts in the 9<sup>th</sup> Circuit have held that although the BOP has "wide discretion" to add categories of ineligibility, it cannot apply them retroactively to already-approved prisoners. See <i>Cort v. Crabtree</i>, 311 F.3d 1081 (9th Cir. 1997); <i>Bowen v. Hood</i>, 202 F.3d 1211 (9th Cir. 2000); <i>Smith v. Thomas</i>, No. CV-09-1398-HA (2010)(No publication information available at this time)</p>					<p>Prepared by Janet Hinton, Chief Paralegal, and Tim Tryniecki, and Meghan McGlynn, Law Clerks, Federal Public Defender (E.D. MO)          (Updated June 2010)</p>

# RDAP ADMISSION CRITERIA

- Must have a verifiable substance use disorder consistent with DSM
- Disorder must be within 12 months prior to arrest
- Sign program agreement
- Be able to complete all 3 components
- Ordinarily have at least 24 months remaining on sentence

# SUBSTANCE ABUSE VERIFICATION (RDAP)

- Documentation supporting substance abuse disorder within 12 month period before inmate's arrest on current offense
- Documentation from probation officer, parole officer, social service professional, substance abuse treatment provider, medical provider.
- Multiple convictions (2 or more) for DWI or DUI in the 5 years prior to most recent arrest

# SUBSTANCE ABUSE VERIFICATION WITHOUT DOCUMENTATION (RDAP)

- Physical proof of substance abuse that may be examined by medical staff to prove an addiction, e.g. track marks, abscesses, etc.
- If inmate received substance detoxification as he entered BOP.

# SUCCESSFUL COMPLETION OF RDAP

Inmates must successfully complete the three following components:

1. Unit-based component
2. Follow-up services
3. Transitional drug abuse treatment (TDAT)

# UNIT-BASED COMPONENT

- Inmates must complete course of activities in a treatment unit set apart from general population for at least 6 months
- Minimum of 500 hours
- Duration of 9 to 12 months

# FOLLOW-UP SERVICES COMPONENT

- After completion of unit-based component, inmate returned to general population and treatment continued
- Inmate must remain in follow-up treatment for 12 months or until transferred to RRC

# TRANSITIONAL DRUG ABUSE TREATMENT (TDAT) COMPONENT

- Inmates transferred to community confinement
- Must successfully complete community-based drug abuse treatment program
- Minimum of one hour per month
- No less than 120 day placement in an RRC

# RDAP INCENTIVES

- Financial awards
- Maximum time in RRC
- Preferred living quarters
- Early release pursuant to 18 USC §3621(e)
- Transfer to facility closer to family

# RESIDENTIAL DRUG ABUSE PROGRAM EARLY RELEASE REDUCTION

- If sentence length is 30 months or less, early release cannot exceed 6 months
- If sentence is 31-36 months, early release is no more than 9 months
- If sentence is 37 months or more, early release is no more than 1 year.

# EARLY RELEASE ELIGIBILITY

- Have a substantiated substance abuse disorder
- Were imprisoned for a nonviolent offense
- Successfully completed RDAP unit-based component, follow up, and TDAT
- Are compliant with Financial Responsibility Program

# INMATES NOT ELIGIBLE FOR EARLY RELEASE UNDER RDAP

- ICE detainees
- Previously received early release under §3621 (e)
- Detainer lodged
- Previously convicted of a misdemeanor or felony for homicide, forcible rape, robbery, aggravated assault, arson, kidnapping, or sexual abuse against a minor

# INMATES NOT ELIGIBLE FOR EARLY RELEASE REDUCTION

- Currently convicted of a felony for offense involving :
  - as an element the actual, attempted, or threatened use of physical force against the person or property of another;
  - carrying, possession, use of a firearm, dangerous weapon, or explosives;
  - serious potential risk of physical force against a person or property of another; or
  - sexual abuse committed upon a minor

## RESIDENTIAL DRUG ABUSE PROGRAM (RDAP) LOCATIONS

### MID-ATLANTIC REGION

FPC Alderson (WV)◆  
FPC Beckley (WV)  
FCI Beckley (WV)  
FCI Butner (NC)  
FPC Cumberland (MD)  
FCI Cumberland (MD)  
FMC Lexington (KY)◆  
FCI Morgantown (WV)  
FCI Petersburg-Low (VA)  
FCI Petersburg-Med (VA)

### NORTHEAST REGION

FCI Danbury (CT)◆  
FCI Elkton (OH)  
FCI Fairton (NJ)  
FCI Fort Dix (NJ)  
FPC Lewisburg (PA)  
FPC McKean (PA)

#### KEY

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### NORTH CENTRAL REGION

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FPC Florence (CO)  
FCI Florence (CO)  
FPC Greenville (IL)◆  
FPC Leavenworth (KS)  
FCI Leavenworth (KS)  
FCI Milan (MI)  
FCI Oxford (WI)  
FPC Pekin (IL)  
FCI Sandstone (MN)  
USMCFP Springfield (MO)◆  
FCI Waseca (MN)◆  
FPC Yankton (SD)

### SOUTHEAST REGION

FCI Coleman (FL)  
FPC Edgefield (SC)  
FCI Jesup (GA)  
FCI Marianna (FL)  
FPC Miami (FL)  
FPC Montgomery (AL)  
FPC Pensacola (FL)  
FPC Talladega (AL)  
FCI Tallahassee (FL)◆  
FCI Yazoo City (MS)

### SOUTH CENTRAL REGION

FCI Bastrop (TX)  
FPC Beaumont (TX)  
FCI Beaumont (TX)  
FPC Bryan (TX)◆  
FMC Carswell (TX)◆◆  
FCI El Reno (OK)  
FCI Fort Worth (TX)  
FPC Forrest City (AR)  
FCI Forrest City (AR)  
FCI La Tuna (TX)  
FCI Seagoville (TX)  
FPC Texarkana (TX)

### WESTERN REGION

FCI Dublin (CA)◆  
FPC Dublin (CA)◆  
FCI Herlong (CA)  
FPC Lompoc (CA)  
FPC Phoenix (AZ)◆  
FCI Phoenix (AZ)  
FCI Sheridan (OR)  
FPC Sheridan (OR)  
FCI Terminal Island (CA)

### Contract Facility

RCI, (NC)

Updated 11-13-09  
Site last visited 6-14-10  
[http://www.bop.gov/inmate\\_programs/RDAP\\_locations.pdf](http://www.bop.gov/inmate_programs/RDAP_locations.pdf)

# WORK PROGRAMS

All federal inmates are required to work in one of the following programs except those who are unable to do so for security, educational or medical reasons:

- Institution Work

- UNICOR

# INSTITUTION JOBS

- Most inmates are assigned to institution jobs such as food service worker, orderly, plumber, painter, warehouse worker, or groundskeeper
- Ordinarily, seven hour workday-earning 12 to 40 cents per hour

# FPI/UNICOR

- Federal Prison Industries (FPI), under the trade name UNICOR
- Employs over 22,000 inmates
- Wages range from 23 cents to \$1.15 per hour
- Provides employment to as many inmates as possible
- Produces market-priced goods for federal government customers
- Operates in a self-sustaining manner

# INMATE FINANCIAL RESPONSIBILITY PROGRAM (IFRP)

- BOP operates IFRP to assist in the collection of court-ordered financial obligations (special assessments, restitution, fines and court costs, state or local court obligations and other federal obligations)
- All inmates are encouraged to work with staff to develop an individual financial plan
- IFRP participation is tied to eligibility for prison privileges including preferred housing, job assignments, and community confinement and furloughs, and institutional program and custody level changes
- See Program Statement 5380.08, Financial Responsibility Program, Inmate

# ELDERLY INMATE PILOT PROGRAM

- Part of the Second Chance Act
- Purpose is to move eligible elderly offenders from BOP to home detention until their confinement has expired. 42 USC § 17451(g)(1)(A)

# ELDERLY INMATE PROGRAM REQUIREMENTS

- Offender must be not less than 65 years of age
- Cannot be serving a sentence of life imprisonment
- Cannot be imprisoned based on conviction for (or history of) any crime of violence, sex offense, or other offenses enumerated in statute
- Offender must have served greater of 10 years or 75% of the term of imprisonment

# ELDERLY INMATE PROGRAM REQUIREMENTS

- Offender must not have escaped (or attempted) from BOP
- BOP must determine that release will result in substantial net reduction of costs
- BOP must determine that the offender poses no substantial risk of engaging in criminal conduct or endangering any person

# COMPASSIONATE RELEASE

- For inmates whose offense occurred on or after November 1, 1987, the applicable statute is 18 USC §3582 (c)(1)(A), the court release a defendant if it finds:
  - extraordinary and compelling reasons
  - the defendant is at least 70 years of age
  - has served at least 30 years in prison
  - the defendant is no longer a danger
- See Program Statement, 5050.46, Compassionate Release

# MOTHERS AND INFANTS NUTURING TOGETHER (MINT) PROGRAM

- RRC-based residential program that allows low risk female inmates to bond with their newborns before returning to prison.
- Women are placed in the program two months prior to delivery
- After birth, women are allowed 3 months to bond with the child
- Prior to birth, mother must make arrangements for a custodian to take care of child

# BOTTOM LINE CHECKLIST

- BEFORE SENTENCING:
  1. Review PSR carefully. Do your best to remove any undocumented, harmful behavior from PSR. Talk to probation officer first.
  2. Provide school records to probation. Check to see if PSR correctly lists the client's educational history.
  3. Provide medical records to probation. Ensure PSR properly reflects the client's medical history.

# BOTTOM LINE CHECKLIST

4. Make sure the PSR correctly reflects the status of any warrants, detainers, or dismissed cases.
5. Make sure the client discloses any drug/alcohol abuse to probation or you provide documentation for RDAP verification purposes.
6. Make sure the client's name and residence are correct. In the PSR. The "committed" name will be on any diplomas the inmate earns. The address will be used to attempt to designate client within 500 miles.

# BOTTOM LINE CHECKLIST

7. Object to criminal history points even if they make no difference to the criminal history category because it may make a difference in the client's designation.
8. Determine if your client is in federal court under primary state custody by looking at the federal court's docket sheet for a writ of habeas corpus ad prosequendum.

# BOTTOM LINE CHECKLIST

- AT SENTENCING:
  1. Request the court recommend the lowest security level facility that is near the client's residence and offers programs/activities for the client.
  2. If the client is in primary state custody, request a designation to a state facility and that the court order the federal sentence run concurrently with the state sentence.

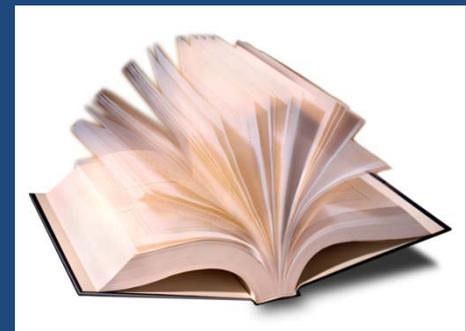
# BOTTOM LINE CHECKLIST

3. Request a recommendation to the RDAP program, if applicable.
4. Request that client be allowed to self-surrender.
5. Request MINT program if applicable.

# BOTTOM LINE CHECKLIST

- AFTER SENTENCING:
  1. Remind client to start working on the GED program as soon as possible so he can earn the maximum amount of good time credit.
  2. Remind client to set up a financial plan under IFRP.

# RESOURCES



# INMATE LOCATOR

- Located on [www.bop.gov](http://www.bop.gov)
- You can find an inmate's location using a search by name or a search by the inmate's register number
- It also gives you the inmate's release date

# BOP POLICY STATEMENTS

1. To find them, go to: [www.bop.gov](http://www.bop.gov)
2. Select Policy/Forms on toolbar located above
3. Select “Find a Policy” on left side of screen
4. Click on 5000 Series Link to see the policies used here.

# www.bop.gov

- Legal Resource Guide to the Federal Bureau of Prisons 2008 located at [www.bop.gov/news/PDFs/legal\\_guide.pdf](http://www.bop.gov/news/PDFs/legal_guide.pdf)
- Interaction of Federal and State Sentences when the Federal Defendant is Under State Primary Jurisdiction dated November 18, 2009 by Henry Sadowski

- Alan Ellis Federal Prison Guidebook, 2008-2010 Edition, by Alan Ellis & J. Michael Henderson.

# WHAT DO YOU DO IF YOU HAVE A QUESTION?

Call the following:

1. Bureau of Prisons Regional Offices
2. Designation and Sentence Computation Center (DSCC)

DESIGNATION AND SENTENCE  
COMPUTATION CENTER (DSCC)  
CONTACT INFORMATION

Designation and Sentence Computation  
Center (DSCC)

Grand Prairie Office Complex

U.S. Armed Forces Reserve Complex

346 Marine Forces Drive

Grand Prairie, Texas 75051

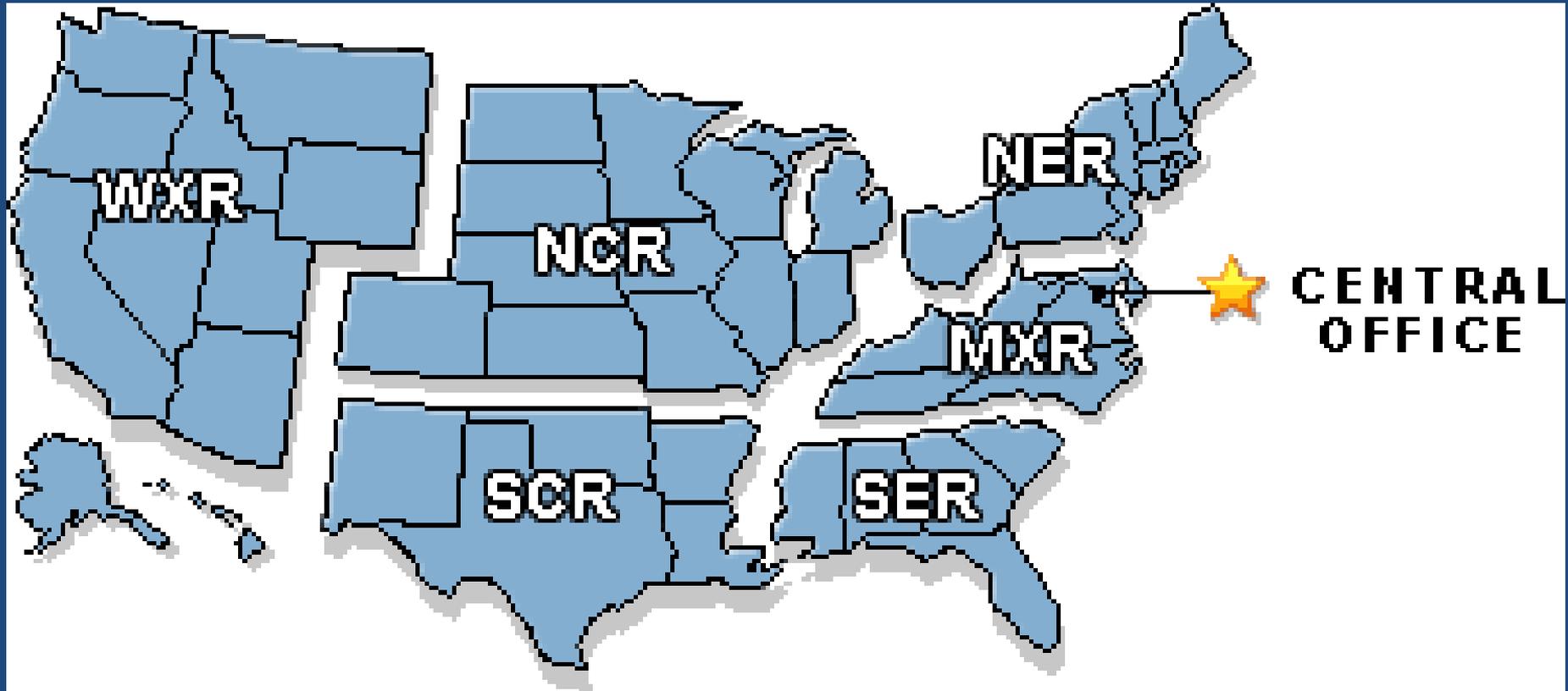
(972) 352-4200

# BOP REGIONAL OFFICE CONTACT INFORMATION

- Mid Atlantic Regional Office  
Federal Bureau of Prisons  
302 Sentinel Drive Suite 200  
Annapolis Junction, MD 20701  
(301) 317-3100
- Northeast Regional Office  
Federal Bureau of Prisons  
200 Chestnut Street, 7<sup>th</sup> Floor  
Philadelphia, PA 19106  
(215) 521-7300
- North Central Regional Office  
Federal Bureau of Prisons  
400 State Avenue, Suite 800  
Kansas City, KS 66101-2421  
(913) 621-3939

# BOP REGIONAL OFFICE CONTACT INFORMATION

- Western Regional Office  
Federal Bureau of Prisons  
7338 Shoreline Drive  
Stockton, CA 95219  
(209) 956-9700
- South Central Regional Office  
Federal Bureau of Prisons  
4211 Cedar Springs Road, Suite 300  
Dallas, Texas 75219  
(214) 224-3389
- Southeast Regional Office  
Federal Bureau of Prisons  
3800 Camp Creek Parkway, SW Building 2000  
Atlanta, GA 30331  
(678) 686-1200



**WXR**

**NCR**

**NER**

**MCR**

**SCR**

**SER**

**CENTRAL  
OFFICE**

# SMOOTH SAILING



## BUREAU OF PRISONS RESIDENTIAL DRUG ABUSE PROGRAM REFERENCE CHART - Residential Drug Abuse Treatment Program (RDAP)

Eligibility Requirements* <sup>o</sup>	Disqualifiers* <sup>o</sup>	Incentives*	Program Cessation* <sup>o</sup>	Structure* <sup>o</sup>	Early Release (ER) <sup>†</sup> <sup>o</sup>
<p><u>To qualify for admission, prisoners must:</u></p> <ol style="list-style-type: none"> <li>1. Have a documented and verifiable substance abuse disorder consistent with the American Psychiatric Association per the DSM</li> <li>2. Disorder must be within the 12-months prior to arrest;</li> <li>3. Sign program agreement</li> <li>4. Be able to complete all three components of program (see "Structure")</li> <li>5. Ordinarily" have at least 24 months remaining on sentence</li> </ol> <p><u>Note:</u> documentation can be shown through (a) probation or parole officer; (b) substance abuse treatment provider; (c) multiple recent DUI/DWI convictions; if prisoners lacks verifying documentation but have physical proof, such as track marks or abscesses, they may consent to drug treatment staff receiving medical staff's examination results</p>	<p><u>Prisoners are not eligible if:</u></p> <ol style="list-style-type: none"> <li>1. Insufficient time remaining on sentence</li> <li>2. language barriers prohibit sufficient communication</li> <li>3. cognitive impairment precludes meaningful participation</li> </ol> <p><u>Note:</u> disabled prisoners may still qualify so long as they are otherwise qualified and able to fully participate</p>	<p><u>Prisoners may earn the following incentives for participation if eligible (based on financial program responsibility and GED compliance):</u></p> <ul style="list-style-type: none"> <li>• Financial awards</li> <li>• Maximum time in community program</li> <li>• Preferred living quarters</li> <li>• Early release pursuant to 18 U.S.C. § 3621(e)</li> <li>• Transfer to facility closer to family</li> <li>• Achievement awards</li> <li>• Photographs of ceremonies sent to families</li> </ul> <p><u>Note:</u> if a prisoner discontinues RDAP, he or she may lose incentives.</p>	<p><u>Prisoners may discontinue in the program by:</u></p> <ol style="list-style-type: none"> <li>1. Voluntary withdrawal</li> <li>2. Possible expulsion due to disruptive behavior or confidentiality violation</li> <li>3. Mandatory expulsion if Discipline Hearing Officer finds prisoner has (a) drug or alcohol violation; (b) violence or threat of; (c) escape or attempt; or (d) 100-level series incident</li> </ol> <p><u>Note:</u> removal or withdrawal can result in (a) transfer to prior institution; (b)ineligibility for non-emergency furlough; performance, vacation, or bonus pay; work program; rewards</p> <p><u>Also note:</u> prisoners may re-apply for the program; however, no credit is given for prior participation</p>	<p><u>Prisoners must complete each phase of the treatment, including</u></p> <ol style="list-style-type: none"> <li>1. Unit-Based Component (involving at least 6 months in special unit and 500 hours of activities)</li> <li>2. Follow-up Services (if time allows between unit program and TDAT) and</li> <li>3. Transitional Drug Abuse Treatment (TDAT) (community drug treatment program) (for a minimum of one hour per month for a minimum of 120 days)</li> </ol>	<p><u>Pursuant to 18 U.S.C. § 3621(e), prisoners may be eligible for early release if they:</u></p> <ol style="list-style-type: none"> <li>1. Have a substantiated substance abuse disorder</li> <li>2. Were imprisoned for a nonviolent offense</li> <li>3. Successfully completed RDAP, follow up, and TDAT</li> <li>4. Are compliant with Financial Responsibility Program</li> </ol> <p><u>Per the BOP Director's discretion, prisoners may not be eligible for ER if they are/have been:‡</u></p> <ol style="list-style-type: none"> <li>1. ICE Detainees/Pretrial prisoners/Contractual boarders</li> <li>2. <i>Previously</i> convicted of either a misdemeanor or felony for (a) homicide, (b) forcible rape, (c) robbery, (d) aggravated assault, (e) arson, (f) kidnaping, or (g) sexual abuse against a minor‡</li> <li>3. <i>Currently</i> convicted of a felony for an offense involving (a) as an element the actual, attempted, or threatened use of physical force against the person or property of another; (b) carrying, possession, or use of a firearm, dangerous weapon, or explosives; (c) a serious potential risk of physical force against a person or property of another; or (d) sexual abuse committed upon a minor♦**</li> <li>4. <i>Previously</i> convicted of attempt, conspiracy, or other offense listed above in subsection 2 or 3</li> <li>5. A designated felon with an enhanced base level in the Sentencing Guidelines for use/threatened use of force or for which a specific offense characteristic was applied for possession of weapon or use of force was implicated‡</li> <li>6. Previously received early release pursuant to § 3621(e)</li> <li>7. Lodged with a detainer that prevents completion of RDAP</li> </ol> <p><u>Early Release (ER) reduction:</u></p> <ul style="list-style-type: none"> <li>• If sentence length is 30 months or less, ER cannot exceed 6 months</li> <li>• if sentence is 31-36 months, ER no more than 9 months</li> <li>• if sentence is 37 months or more, ER no more than 1 year.</li> </ul>
<p>*See <i>Psychology Treatment Programs</i> Program Statement, 5330.11(effective 3/16/09) <a href="http://www.bop.gov">www.bop.gov</a>          ♦ See <i>Early Release Procedures Under 18 U.S.C. § 3621 (e)</i> Program Statement, 5331.02 (effective 3/16/09) <a href="http://www.bop.gov">www.bop.gov</a>          †See <i>Categorization of Offenses</i> Program Statement, 5162.05 (effective 3/16/09) <a href="http://www.bop.gov">www.bop.gov</a>          o See 28 C.F.R. § 550.53-56 (2009)</p>					
<p>** Categorical exclusion from eligibility for prisoners with convictions for firearms possession and crimes of violence were found invalid in the 9<sup>th</sup> Circuit. <i>Arrington v. Daniels</i>, 516 F.3d 1106 (9th Cir. 2008); <i>Crickon v. Thomas</i>, 579 F.3d 978 (9th Cir. 2009).          ‡ Courts in the 9<sup>th</sup> Circuit have held that although the BOP has "wide discretion" to add categories of ineligibility, it cannot apply them retroactively to already-approved prisoners. See <i>Cort v. Crabtree</i>, 3 113 F.3d 1081 (9th Cir. 1997); <i>Bowen v. Hood</i>, 202 F.3d 1211 (9th Cir. 2000); <i>Smith v. Thomas</i>, No. CV-09-1398-HA (2010)(No publication information available at this time)</p>					<p>Prepared by Janet Hinton, Cheif Paralegal, and Tim Tryniecki, and Meghan McGlynn, Law Clerks, Federal Public Defender (E.D. MO)          (Updated June 2010)</p>

## RESIDENTIAL DRUG ABUSE PROGRAM (RDAP) LOCATIONS

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## **INTERACTION OF FEDERAL AND STATE SENTENCES WHEN THE FEDERAL DEFENDANT IS UNDER STATE PRIMARY JURISDICTION**

Henry J. Sadowski, Regional Counsel  
Northeast Region, Federal Bureau of Prisons

This memorandum details how the Federal Bureau of Prisons computes federal sentences imposed when the defendant is under the primary custodial jurisdiction of state authorities. This is probably the single most confusing and least understood federal sentencing issue. To place this discussion into context, basic sentencing principles will be discussed and then applied to state and federal sentencing interaction. The policy of the Bureau of Prisons concerning where the federal sentence is served will also be addressed.

### **BASIC FEDERAL SENTENCE COMPUTATION DECISIONS**

In any computation of a federal sentence, two separate decisions must be made: when the federal sentence commences and to what extent the defendant can receive credit for time spent in custody prior to commencement of sentence.<sup>1</sup> For offenses committed prior to November 1, 1987, each of these decisions is governed by repealed 18 U.S.C. § 3568. Section 3568 specifies that the Attorney General is responsible for sentence computation decisions. For offenses committed on or after November 1, 1987, commencement of federal sentence is governed by 18 U.S.C. § 3585(a), and prior custody credit is governed by 18 U.S.C. § 3585(b). The provisions of § 3585 were designed to maintain the same basic authority for sentence computation in the Attorney General as under its predecessor. United States v. Wilson, 503 U.S. 329, 112 S.Ct. 1351 (1992). Wilson held that, although new § 3585 omits the language of old § 3568 specifying that the Attorney General is responsible for sentence computation, Congress did not intend to change this well settled authority. Id. The authority of the Attorney General to compute sentences has been delegated to the Federal Bureau of Prisons by 28 C.F.R. § 0.96 (2007).<sup>2</sup>

### **COMMENCEMENT OF FEDERAL SENTENCE**

The underlying principle of both repealed § 3568 and present § 3585(a) is that a federal sentence commences when the defendant is received by the Attorney General of the United States for service of his federal sentence.<sup>3</sup> When a federal sentence is imposed on a defendant in state custody, the federal sentence may commence when the Attorney General agrees to designate

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<sup>1</sup> Chambers v. Holland, 920 F.Supp. 618, 621 (M.D.Pa.), aff'd, 100 F.3d 946 (3d Cir. 1996); United States v. Smith, 812 F.Supp. 368, 370 (E.D.N.Y. 1993).

<sup>2</sup> See United States v. Pineyro, 112 F.3d 43 (2d Cir. 1997).

<sup>3</sup> Pinaud v. James, 851 F.2d 27 (2d Cir. 1988); Salley v. United States, 786 F.2d 546 (2d Cir. 1986); Chambers v. Holland, 920 F.Supp. at 621.

the state facility for service of the federal sentence.<sup>4</sup> The designation authority of the Attorney General under repealed 18 U.S.C. § 4082 had been delegated to the Federal Bureau of Prisons. 28 C.F.R. § 0.96(c). Present 18 U.S.C. § 3621 explicitly vests the designation authority in the Bureau of Prisons. The earliest date a federal sentence can commence is the date it is imposed. Thus, a concurrent sentence commences on date of its imposition not on the date of commencement of prior sentence, or some earlier date.<sup>5</sup> A sentence cannot be ordered to commence at a date prior to its imposition.<sup>6</sup>

A federal sentence does not begin to run when a federal defendant is produced for prosecution by a federal writ of habeas corpus ad prosequendum from state custody.<sup>7</sup> The state authorities retain primary jurisdiction over the prisoner; federal custody does not commence until the state authorities relinquish the prisoner on satisfaction of the state obligation.<sup>8</sup> The sovereign which first arrested the offender has primary jurisdiction over the offender, unless that sovereign relinquishes it to another sovereign by, for example, bail release, dismissal of the state charges, parole release, or expiration of state sentence.<sup>9</sup> When a prisoner is borrowed from the primary custodian via a writ of habeas corpus ad prosequendum, principles of comity require the return of the prisoner to the primary custodian when the prosecution has been completed.<sup>10</sup> This concept of primary jurisdiction controls many of the decisions in this area.

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<sup>4</sup> Taylor v. Sawyer, 284 F.3d 1143 (9th Cir. 2001), cert. denied, 123 S.Ct. 889 (2003); Romandine v. United States, 206 F.3d 731 (7th Cir. 2000); Rogers v. United States, 180 F.3d 349 (1st Cir. 1999), cert. denied, 528 U.S. 1126 (2000); McCarthy v. Doe, 146 F.3d 118 (2d Cir. 1998); Barden v. Keohane, 921 F.2d 476 (3d Cir. 1990); United States v. Pungitore, 910 F.2d 1084, 1118-1119 (3d Cir. 1990), cert. denied, 111 S.Ct. 2009-2011 (1991).

<sup>5</sup> Coloma v. Holder, 445 F.3d 1282 (11th Cir. 2006); Shelvy v. Whitfield, 718 F.2d 441, 444 (D.C.Cir. 1983); United States v. Flores, 616 F.2d 840, 841 (5th Cir. 1980).

<sup>6</sup> United States v. Gonzalez, 192 F.3d 350 (2d Cir. 1999); United States v. Labeille-Soto, 163 F.3d 93 (2d Cir. 1998). But see United States ex rel. Del Genio v. United States Bureau of Prisons, 644 F.2d 585, 589 (7th Cir. 1980), cert. denied, 449 U.S. 1084 (1981) (implying in dicta sentencing judge could order prior commencement).

<sup>7</sup> United States v. Cole, 416 F.3d 894 (8th Cir. 2005); United States v. Evans, 159 F.3d 908 (4th Cir. 1998); Thomas v. Whalen, 962 F.2d 358 (4th Cir. 1992); Thomas v. Brewer, 923 F.2d 1361 (9th Cir. 1991); Barden v. Keohane, 921 F.2d 476 (3d Cir. 1990); Salley v. United States, *supra*; Hernandez v. United States Attorney General, 689 F.2d 915 (10th Cir. 1982); Roche v. Sizer, 675 F.2d 507 (2d Cir. 1982); Chambers v. Holland, 920 F.Supp. at 622.

<sup>8</sup> Rios v. Wiley, 201 F.3d 257, 274 (3d Cir. 2000); Jake v. Herschberger, 173 F.3d 1059 (7th Cir. 1999); Del Guzzi v. United States, 980 F.2d 1269 (9th Cir. 1992); Thomas v. Whalen, 962 F.2d 358 (4th Cir. 1992); Hernandez v. United States Attorney General, *supra*; Roche v. Sizer, *supra*; Crawford v. Jackson, 589 F.2d 693 (D.C.Cir. 1978), cert. denied, 441 U.S. 934 (1979); Cobb v. United States, 583 F.2d 695 (4th Cir. 1978); Chambers v. Holland, *supra*; Shumate v. United States, 893 F.Supp. 137 (N.D.N.Y. 1995); Miller v. United States, 826 F.Supp. 636 (N.D.N.Y. 1993). See also Bowman v. United States, 672 F.2d 1145, 1153-154 (3d Cir. 1982).

<sup>9</sup> United States v. Cole, 416 F.3d 894 (8th Cir. 2005); Rios v. Wiley, 201 F.3d at 274; Taylor v. Reno, 164 F.3d 440 (9th Cir. 1998); United States v. Warren, 610 F.2d 680 (9th Cir. 1980); Chambers v. Holland, 920 F.Supp. at 622; United States v. Smith, 812 F.Supp. 368 (E.D.N.Y. 1993).

<sup>10</sup> Delima v. United States, 41 F.Supp. 2d 359 (E.D.N.Y. 1999), aff'd, 213 F.3d 625 (2d Cir. 2000).

## **PRIOR CUSTODY CREDIT**

Under the old § 3568, a federal prisoner was not entitled to prior custody time credit towards a federal sentence for the period spent in state custody especially when the state provided credit for the same period towards a state sentence.<sup>11</sup> Time in custody of the United States Marshal pursuant to a federal writ of habeas corpus ad prosequendum from state custody is not federal custody in connection with the federal offense.<sup>12</sup> For new law cases, the Supreme Court noted that under new § 3585(b), "Congress made clear that a defendant could not receive double credit for his detention time." United States v. Wilson, 112 S.Ct. at 1356. Under § 3585(b), prior custody credit cannot be granted if the prisoner has received credit towards another sentence.<sup>13</sup> There are some limited exceptions,<sup>14</sup> but the general rule is no credit is afforded towards a federal sentence if credit has been given for the same period of custody towards a state sentence.

## **CONCURRENT VERSUS CONSECUTIVE SERVICE OF FEDERAL SENTENCE WITH STATE SENTENCE**

As in the commencement decision, the order in which sentences are served is governed by the concept of primary jurisdiction. If state and federal sentences are imposed on an offender, the general rule is that the sentence imposed by the sovereign with primary jurisdiction is served first. Generally, decisions concerning concurrent or consecutive service of a federal sentence with a state sentence are not dependent on the order of sentence imposition. If the federal judgment and commitment order is silent and if the state authorities have primary jurisdiction over the defendant, the default by the Bureau of Prisons is to compute the federal sentence as consecutive with the state sentence regardless of which sentence was imposed first<sup>15</sup>. Under 18 U.S.C. § 3584, the federal sentencing judge may specifically order the federal sentence to run consecutively with a state sentence.<sup>16</sup> The Bureau of Prisons interprets § 3584 to also permit the

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<sup>11</sup> Del Guzzi v. United States, 980 F.2d 1269 (9th Cir. 1992); United States v. Blankenship, 733 F.2d 433 (6th Cir. 1984); United States v. Grimes, 641 F.2d 96 (3d Cir. 1981); Siegal v. United States, 436 F.2d 92, 95 (2d Cir. 1970).

<sup>12</sup> E.g., United States v. Mills, 501 F.3d 9 (1st Cir. 2007); Rios v. Wiley, 201 F.3d at 271-74; Thomas v. Whalen, supra; Chambers v. Holland, 920 F.Supp. at 622; Miller v. United States, supra; United States v. Smith, 812 F.Supp. 368 (E.D.N.Y. 1993). But see Brown v. Perrill, 28 F.3d 1073 (10th Cir. 1994).

<sup>13</sup> Rios v. Wiley, 201 F.3d at 272; Tisdale v. Meniffee, 166 F.Supp. 2d 789 (S.D.N.Y.2001)

<sup>14</sup> See Kayfez v. Gasele, 993 F.2d 1288 (7th Cir. 1993).

<sup>15</sup> This rebuttable default is drawn from 18 U.S.C. § 3584(a) which generally requires consecutive service of sentence imposed at different times unless the court specifies concurrent service.

<sup>16</sup> United States v. Williams, 46 F.3d 57 (10th Cir. ), cert. denied, 116 S.Ct. 92 (1995); United States v. Ballard, 6 F.3d 1502 (11th Cir. 1993); United States v. Hardesty, 958 F.2d 910 (9th Cir. 1992); Pinaud v. James, 851 F.2d 27 (2d Cir. 1988); Salley v. United States, 786 F.2d 546 (2d Cir. 1986) .

federal judge to order concurrent service with an existing state sentence.<sup>17</sup> There is a split in the circuits on whether the federal judge can order concurrent or consecutive service with a state sentence yet to be imposed.<sup>18</sup> The position of the United States is that § 3584 does not authorize a federal sentencing court to order concurrent or consecutive service with a sentence yet to be imposed. The sentencing court could recommend concurrent or consecutive service with a yet to be imposed state sentence. The Bureau would consider strongly any such recommendation from the federal sentencing court.<sup>19</sup> To allow the federal sentence to commence, the Bureau of Prisons designates the state correctional institution (the primary custodian) for service of the federal sentence. Since the earliest date a federal sentence can commence is the date it is imposed, this designation may be made nunc pro tunc no earlier than the date of federal sentencing. A sentence may not be ordered to run concurrently with a sentence which has been served.<sup>20</sup>

Under old law, 18 U.S.C. § 3568, when the state had primary jurisdiction, an order by the federal sentencing judge to run the federal sentence concurrently with a state sentence (even one yet to be imposed) was treated by the Bureau of Prisons as a recommendation since the federal sentencing court had no power to order a federal sentence to run concurrently with a state sentence.<sup>21</sup> Since the Bureau usually follows a concurrent recommendation from the sentencing judge, the issue of the authority of a federal judge to order concurrent service has been rarely tested. To give effect to the federal sentence court's recommendation and allow the federal sentence to commence, the Bureau designates the state facility for service of the federal sentence.<sup>22</sup>

## **PLACE OF INCARCERATION**

The primary custodian is responsible for the custody of the defendant, until primary jurisdiction is relinquished. If a defendant has been arrested by state authorities and the state

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<sup>17</sup> United States v. Fuentes, 107 F.3d 1515, 1519 n.6 (11th Cir. 1997).

<sup>18</sup> Contrast United States v. Andrews, 330 F.3d 1305 (11th Cir. 2003); United States v. Mayotte, 249 F.3d 797 (8th Cir. 2001); United States v. Williams, supra; United States v. Ballard, supra; Salley v. United States, supra; with Abdul-Malik v. Hawk-Sawyer, 403 F.3d 72 (2d Cir. 2005); Romandine v. United States, 206 F.3d 731 (7th Cir. 2000); United States v. Quintero, 157 F.3d 1038 (6th Cir. 1998); McCarthy v. Doe, 146 F.3d 118 (2d Cir. 1998); United States v. Clayton, 927 F.2d 491 (9th Cir. 1991). See also United States v. Smith, 472 F.3d 222 (4th Cir. 2006) (federal sentence cannot be ordered to run consecutive with future federal sentence).

<sup>19</sup> Federal sentencing orders have a section for recommendations to the Bureau of Prisons. A judicial recommendation contemporaneous with the date of sentencing would obviate the need to return to the sentencing judge, perhaps years later, to ascertain the intent of the judge.

<sup>20</sup> United States v. Labeille-Soto, supra.

<sup>21</sup> Barden v. Keohane, 921 F.2d 476 (3d Cir. 1990); United States v. Campisi, 622 F.2d 697 (3d Cir. 1980); Gomori v. Arnold, 533 F.2d 871 (3d Cir.), cert. denied, 429 U.S. 851 (1976); United States v. Huss, 520 F.2d 598 (2d Cir. 1975).

<sup>22</sup> See footnote 4.

never relinquished custody (by bail, dismissal of charges, parole, etc.), the defendant must serve his state sentence in state custody. Production of the defendant via a federal writ of habeas corpus ad prosequendum does not shift the primary jurisdiction of custody to federal authorities.<sup>23</sup> After the writ is satisfied, the United States Marshal must return the "loaned" defendant back to the state, the primary custodian. Primary jurisdiction is not effected by the order of imposition of federal and state sentence.

The jurisdiction which is the primary custodian is responsible for the costs of incarceration. When the federal authorities are the primary custodian of the prisoner, the United States bears the costs of incarceration. When the state authority is primary custodian, the state bears the costs of incarceration. When the state has primary jurisdiction over a defendant, the federal sentencing judge may not order the delivery of the defendant for service of sentence in a federal institution. This order is tantamount to a transfer of custody beyond the jurisdiction of the federal court.<sup>24</sup> Similarly, when the state has primary jurisdiction, the state sentencing judge cannot order that the state prisoner be transported to a federal institution to serve his state sentence.<sup>25</sup> A state court has no authority to order how a federal sentence is to be computed or served.<sup>26</sup>

There are several ways in which the Federal Bureau of Prisons may accept a prisoner in primary state custody. First, under a contract pursuant to 18 U.S.C. § 5003, the state authority could request transfer of the prisoner to the federal authorities with the understanding that the costs of incarceration are reimbursed to the United States. A request to transfer under a contract is usually initiated by the correctional authority of the state with primary jurisdiction. The existence of a contract between the state in question and the Bureau must be checked. Secondly, the United States Attorney's Office may sponsor the placement of a state prisoner in the witness protection program under 18 U.S.C. § 3521. Finally, the Federal Bureau of Prisons will accept a state defendant when the state authorities relinquish primary jurisdiction by parole, bail, dismissal, etc. The act relinquishing primary jurisdiction usually requires the United States Marshal to assume custody pursuant to an outstanding detainer. The Marshal then transfers the prisoner to a federal facility designated by the Federal Bureau of Prisons. If the United States obtains a state inmate under the Interstate Agreement of Detainers Act (instead of through a writ), the same concepts discussed herein apply: the production of an inmate under the IAD does not shift primary jurisdiction.

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<sup>23</sup> See footnote 11.

<sup>24</sup> United States v. Warren, 610 F.2d 680 (9th Cir. 1980); Moore v. Schuetzle, 486 F.Supp. 2d 969 (D.N.D. 2007); Fisher v. Goord, 981 F.Supp. 140, 176 (W.D.N.Y. 1997); United States v. Smith, 812 F.Supp. 368 (E.D.N.Y. 1993).

<sup>25</sup> Leal v. Tombone, 341 F.3d 427 (5th Cir. 2003); Taylor v. Sawyer, 284 F.3d 1143 (9th Cir. 2001), cert. denied, 123 S.Ct. 889 (2003); Del Guzzi v. United States, 980 F.2d 1269 (9th Cir. 1992) .

<sup>26</sup> Fegans v. United States, 506 F.3d 1001, 104 (8th 2007); Leal v. Tombone, *supra*; Taylor v. Sawyer, *supra*; Jake v. Herschberger, 173 F.3d at 1065; United States v. Yates, 58 F.3d 542, 550 (10th Cir. 1995); Pinaud v. James, 851 F.2d 27, 32 (2d Cir. 1988); United States v. Sackinger, 704 F.2d 29, 32 (2d Cir. 1983).

## **IMPACT OF SENTENCING GUIDELINE 5G1.3**

At sentencing, it is important to determine to what extent U.S.S.G. § 5G1.3 applies to the defendant. In certain circumstances, 5G1.3 permits the court to make an adjustment or a downward departure for time spent in detention which would not be awarded towards the federal sentence by the Bureau of Prisons under 18 U.S.C. § 3585(b). Section 5G1.3 has been modified several times, so it is crucial to determine which version applies to the defendant.<sup>27</sup> The present version of 5G1.3 permits an adjustment (non-departure) if the time in detention is related to the federal offense (5G1.3(b)). If the court finds an adjustment is justified based on a discharged sentence, the adjustment is to be via downward departure. If the federal sentencing judge invokes 5G1.3, it is crucial for the Judgment and Commitment order to delineate exactly how the court determined the sentence. For example, if the court applied an adjustment, a reference to 5G1.3(b) and the amount of adjustment should be noted on the Judgment and Commitment order. This reference assists the Bureau in resolving issues concerning the court's intent, which issues often arise years after the sentence was imposed. It is important to note the Bureau of Prisons will apply the prior custody credit standards of 18 U.S.C. § 3585(b) to every federal sentence. Any reference in the Judgment and Commitment order to credit for time served is unnecessary and superfluous.

## **QUESTIONS**

The Bureau has recently centralized its sentence computation and designation functions to the Designation and Sentence Computation Center (DSCC) in Grand Prairie, Texas. In addition to contacting the author, sentence computation questions can also be directed to Sonya Cole, Assistant General Counsel, at the DSCC at (972) 352-4425.

**November 18, 2009**

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<sup>27</sup> There have been disagreements among circuits concerning different applications of § 5G1.3. Research in the respective circuit case law is also crucial. Precise nuances of the Sentencing Guidelines are beyond the intention and the scope of this memorandum. The section was included to alert the reader of this other area of sentencing law which may be impacted when a defendant is subject to state and federal prosecutions.