



Issue No. 4

Out Front

The news from America's prisons, including its federal prisons, usually is not good. We can take no pride in the fact that the United States of America imprisons as many people as it does. Nearly one in 37 Americans is a current or former prison inmate, according to 2001 numbers we review briefly here. By comparison, according to the 2000 census, one in 33 Americans holds a professional or doctoral degree. With the cost of a year in prison comparable to a year in a university's graduate program, in effect we are sending nearly as many people to extended courses of study at 'crime school' (prison), on full scholarships at that, as we are sending to graduate school for a Ph.D. or a professional degree. And few of those in graduate school enjoy full public funding of their tuition and expenses.

But there is a spot of recent good news, and it comes from this state. Chief Judge Barbara B. Crabb of the United States District Court for the Western District of Wisconsin last month became the first federal judge in the country to reject the BOP's contorted reading of the good-time statute, 18 U.S.C. § 3624(b). The case is *White v. Scibana*, No. 03-C-581-C slip op. (W.D. Wis. April 23, 2004). Chief Judge Crabb found the statute unambiguous, and rejected a BOP interpretation that was contrary to the statute's plain terms. The Court ordered BOP to calculate good time at 54 days a year, not the 47 days a year it currently counts.

Will the Department of Justice appeal? We assume, but do not know. Stay tuned.

The
Doing Time

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BY THE NUMBERS

America’s prison population at both the state and federal level is at record levels. For example the federal prison population is larger

than California’s or Texas’ prison populations. At the end of 2001, one in thirty-seven or about 2.7% American adults had been in prison or were still serving time in prison. The number of people going to prison has tripled between 1978 and 2001 due largely to the war on drugs and a get tough on crime attitude. By 2010, the Department of Justice projects that 3.4% of America’s population will have served or will be serving time in prison.

GETTING TO KNOW THE BUREAU OF PRISONS: EXTENDING ADVOCACY BEYOND THE COURTROOM

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Since the advent of the Federal Sentencing Guidelines, an inescapable reality of defense representation is that prison is the presumptive punishment for convicted offenders.¹ The numbers don’t lie. In 1987, there were 48,300 offenders under federal correctional supervision.² Today, there are more than 175,000³ (a three-and-a-half fold increase), and estimates place the 2007 figure at 205,000.⁴ Beyond emphasizing the need for meaningful sentencing reform, these numbers reveal a starker truth. To be an effective advocate in today’s federal criminal justice system, one must understand the Federal Bureau of Prisons (BOP or bureau), its policies, and its nuances. This article addresses topics defense attorneys commonly encounter when assisting

clients facing sentencing to, or incarcerated within, the BOP: the nature and structure of the bureau, the use of program statements, the significance of the Presentence Report, the designation process, potential pitfalls of presenting medical or mental health mitigation, the RDAP, the boot camp, furloughs and transfers.

To Understand the BOP is to Understand Bureaucracy

True to its name, the BOP can often appear a monolithic bureaucracy. With over 34,000 employees at 102 facilities nationwide, the federal prison system relies substantially on a hierarchal structure.⁵ The majority of decision-making that affects individual inmates occurs at the local (*i.e.*, institutional) level, with senior administrators providing general oversight from one of the bureau's six regional offices or the Central Office in Washington, D.C. Federal prisons are identifiable by the security-level of the populations they house and the corresponding levels of freedom they afford. Federal Prison Camps (FPCs, "camps," or "Club Fed"⁶) house Minimum-security inmates, essentially nonviolent offenders with limited criminal histories and less than ten (10) years remaining to serve. Federal Correctional Institutions, or FCIs, are divided into two categories: Low and Medium, connoting the respective security levels of their populations. Barbed-

wire perimeter fencing, higher staff-to-inmate ratios, and more restrictive movement characterize life at an FCI. Nearly all United States Penitentiaries (USPs) are High-security institutions, and, for those offenders who pose the greatest perceived risk to public safety, the BOP opened ADX Florence, Colorado, a Supermax facility, in 1995. In addition to these general categories, the bureau maintains seven Federal Medical Centers (FMCs); the Federal Transfer Center (FTC) in Oklahoma City; and federal detention centers in major metropolitan areas, such as New York and Miami. It also contracts with state and private penal institutions across the country. Staffing these institutions is an array of counselors, correctional officers, medical personnel, and administrators. While not seeking to demean correctional workers or the difficult duties they have assumed, the following is a broad, though reasonably accurate, generalization of BOP employees: they tend to be conservative-minded (*i.e.*, bureaucratic), reside and work in rural areas, envision their positions as part of a 20-plus year career in corrections and, likewise, subscribe to set of institutional values that emphasizes the protection of public safety and the need for order. Many also have previous military or law enforcement training and experience, and all are charged with maintaining security and serving as "law-abiding role models."⁷ This latter mandate

compels regular (daily) interaction with the populations they manage. A federal inmate's principal interaction is with his Unit Team, which consists of a counselor, a case manager, and the Unit Team manager. These are the individuals to whom concerns, grievances, requests, etc. are addressed. To the extent that an inmate disagrees with a Unit Team determination, the primary remedy is an appeal to the warden. However, wardens, who are vested with enormous discretion often analogized to that of feudal lords, customarily stand behind staff decisions, thereby leaving little opportunity for meaningful review. Though additional appeals can be made to the regional and central offices⁸, the enormity of running more than 100 institutions of varying security levels makes micromanagement infeasible. In other words, wardens serve at the frontline of the BOP's senior administration, and, absent clear abuses of discretion, their decisions usually stand.

Program Statements are The Law

The bureau combats systemic disparities in managerial decisions through the promulgation of Program Statements, written rules designed to regulate nearly every conceivable aspect of an inmate's life. As one former federal inmate succinctly stated: "The rules of the outside world don't apply on the inside. Everything is run according

to the program statements." Thus, familiarity with applicable program statements, several of which are discussed herein and all of which are available on-line⁹, is essential to effective representation in any situation involving the BOP. Program statements are no different than most administrative rules: they are replete with ambiguities and subject to discretionary interpretation. However, prudence dictates that defense counsel's instinctive desire to fully advance her client's case is measured against the reality of the milieu in which she is toiling. The BOP is unlike other federal agencies. Federal prison officials operate pursuant to judicially recognized discretion that affords immense latitude in devising and implementing correctional practices.¹⁰ Equally as significant, the majority of correctional workers, who daily interpret and enforce program statements, are not lawyers or legally trained. *This point cannot be overstated.* Countless conversations with attorneys regarding federal prison issues suggests that much of the frustration encountered when working with the BOP stems from an insufficient appreciation for the background and mindset of the individuals with whom they are interacting. In addition to the generalization, *supra*, regarding corrections staff, it is useful to recall the exasperation one may experience when representing a particularly 'difficult' client. Multiple that ten-fold, and

you can begin to appreciate the demands put on a counselor or case manager faced with a cadre of comparable individuals who would prefer to be anywhere but in prison. Couple those challenges with a desire for career advancement, and it is easy to understand why correctional officials lean toward risk avoidance and are disinclined to make exceptions to program statements. Nonetheless, bureau personnel do acknowledge mistakes or oversights, especially if approached tactfully. So, before picking up the phone or sending off a letter, gain a working knowledge of the program statement(s) governing any contested issue.

Never Underestimate the Importance of the Presentence Report

A truism emanating from the BOP, but unknown to many defense attorneys, is that the Presentence Investigation Report (PSI) is 'the Bible' affecting virtually every staff decision during an inmate's time in federal custody. Within days after sentencing, the Marshal's Service forwards the PSI, along with the Judgment and Commitment Order, to the local Community Corrections Manager (CCM) for review and consideration.¹¹ In most instances, that is *all* the bureau is given. Accordingly, for its purposes, an inmate is the person depicted in his PSI. It is from the PSI that the CCM obtains information for entry into

the BOP's computerized management and tracking system (SENTRY) and 'scores out' an inmate to determine his appropriate security level, *infra*. Institution staff also relies on the PSI when evaluating an inmate's programming needs and suitability.

Given a PSI's importance, counsel should review it not only for errors and omissions that might adversely impact sentencing deliberations, but also for information, or the lack thereof, that might serve to prejudice clients before the BOP. One area of concern is references to extraneous conduct, such as in drug conspiracy or RICO cases involving numerous co-defendants with whom a client had no contact. Probation officers in such cases often draft a single offense conduct section that is inserted into each co-defendant's PSI regardless of their respective roles or ignorance of one another. Even if the Court does not consider a co-defendant's actions in its sentencing deliberations, the BOP rarely misses references to gun running, extortionate threats, or violence. Thus, while your client may have had no direct involvement in these unrelated activities, red flags will raise, and bureau personnel may develop a lasting unfavorable impression, albeit subconsciously. Because information is seldom removed once placed in a PSI, it is vital to prevent inclusion of potentially harmful information before the draft PSI is completed. If

that fails, the defense response should include a specific request for the wholesale removal of objectionable references, not merely a notation in PSI's appendix. Should the probation officer refuse modification, it then becomes necessary to ask the Court to order the Probation Office's deletion/modification of superfluous information before the PSI is forwarded to the BOP. Similarly, defense counsel should make every effort to provide the Probation Office with information and documentation pertinent to a client's incarceration, such as medical records or evaluations related to anticipated programming. It may prove helpful to have certain items appended to the PSI, though the Probation Office is under no obligation to satisfy such a request. Be prepared to forward documentation to the BOP under separate cover, including the sentencing transcript, or portions thereof that reflect the Court's consideration of PSI objections or its position regarding conditions of confinement. Information should be sent to the Community Corrections Manager prior to designation or to the case manager of an incarcerated individual, with a specific request that the materials be placed in the client's "central file."

Determining Where Your Client is Likely Headed

"Where will I be going?" It's the question customarily posed by every client contemplating a term of imprisonment. The stock response usually consists of reference to the closest federal facility and mention of a previous client incarcerated there. Such an answer echoes the '500-Mile Rule': the bureau's stated objective of placing each inmate at the lowest security level institution for which he qualifies within 500 miles of his release residence.¹² However, a host of variables weigh in the bureau's designation of every offender. As noted above, written rules control the process: the BOP's *Security Designation and Custody Classification Manual*.

In simplest terms, the *Manual* is an assessment tool that assigns numerical values to factors ostensibly measuring an individual's risk to public safety and institutional security (e.g., presence of detainees, history of escapes or violence, severity of offense, types of prior commitments, pre-commitment status).¹³ Ascertaining a client's security point total – the number dictating Minimum, Low, Medium, or High-security placement – is a straightforward process that entails a review of his PSI in conjunction with the Inmate Load and Security Designation Form and Chapter 5 of the *Manual* (Chapter 6 for female offenders). The more challenging,

though still uncomplicated, task is determining whether his security point total will be abrogated by either a Public Safety Factor (PSF) or a Management Variable, discretionary factors that supercede otherwise appropriate security levels and, possibly, program participation. There are presently 11 PSFs in use by the BOP. Of these, application of any of the following four, though not these four exclusively, prohibits an inmate's placement at a prison camp: Greatest Severity Offense, Sentence Length, Sex Offender, and Deportable Alien.¹⁴ Greatest Severity Offense refers to a *male* inmate's present term of confinement, and includes such offenses as serious assaults, large-scale drug crimes, espionage, extortion through violent means, homicide, kidnapping, robbery, violent sexual offenses, and firearms distribution.¹⁵ Sentence Length looks at a *male* inmate's projected release date – sentence length less anticipated good time credit. Those individuals with more than ten years remaining to serve must be housed in at least a Low-security institution; more than 20 years, Medium-security; and more than 30 years, High-security.¹⁶

Whereas the *Designation and Classification Manual* offers examples of the types of conduct that qualify for application of the Sex Offender PSF, it is essentially assigned when any evidence of sexual misconduct is present in an inmate's background,

including prior conduct and notwithstanding the offense of conviction.¹⁷ Not only does application of this PSF preclude camp placement, but it also bars participation in halfway house/pre-release programs.¹⁸ The same prohibitions hold for non-United States citizens, who are assigned Deportable Alien PSFs absent an INS determination that deportation is not merited. Importantly, the *Manual* enumerates three criteria, the satisfaction of which prevents Deportable Alien PSF application: (1) Documented and/or independently verified history of stable employment in the U.S. for at least three years immediately prior to incarceration. Stable or regular employment is generally defined as full-time (40 hours a week) work...; (2) Verified history of domicile in the U.S. (five or more consecutive years immediately preceding the inmate's incarceration for the current term of confinement...); and (3) Verified strong family ties in the U.S. Strong family ties include only immediate family...¹⁹

Management Variables are grounded in the "professional judgment of bureau staff" and include more nebulous considerations, like population management, the need for medical or psychiatric treatment, and circumstances wherein an inmate poses either a greater or lesser

security risk than his assigned security level denotes.²⁰ Requests for waiver of either a PSF or a Management Variable must be made to the Regional Office.

Once security level is known, the task of determining an individual's likely designated facility is basic. A directory of federal facilities, with associated security levels and contact information, can be obtained through the bureau's Public Information Office or on-line²¹, as can a copy of the BOP's weekly population report.²² From that information, one can identify a facility of appropriate security level, proximity (*i.e.*, within 500 miles) and population.²³ To the extent outstanding questions regarding available programming exist, they should be directed to an institution's Public Information Officer. With the foregoing in hand, one is better able to advocate for placement at a particular institution or in a specific program. Depending on the complexities of a given situation, requests should be made at the earliest opportunity. At a minimum, it is suggested that Sentencing Memoranda include clear 'recommendation language' for inclusion in the Judgment and Commitment Order. Congress has directed the BOP to consider "any statement by the Court that imposed sentence concerning the purposes for which the sentence to imprisonment was determined to be warranted or recommending a type of penal or

correctional facility as appropriate."²⁴ And, while judicial recommendations are not binding on the bureau, "[e]very effort is made to fulfill the Court's request."²⁵

Moreover, a judicial recommendation serves as a strong indicator of the Court's intentions concerning the appropriate handling of a defendant as well as its point of view regarding the applicability of certain security enhancements, such as Public Safety Factors.

The BOP Can Treat Anything

The myriad of discretionary constraints tied to the Federal Sentencing Guidelines can present significant obstacles to the development of persuasive mitigation. Accordingly, defense attorneys justifiably underscore a client's poor health or mental state at sentencing. Sometimes the debilitating nature or unique treatment needs of a client's condition motivate requests for downward departure so that she might avoid subjection to the extreme (and atypical) physical and emotional hardship associated with a term of imprisonment. Such requests are invariably accompanied by reports, and possibly testimony, from medical experts substantiating the need to keep the individual in the community and maintain her continuum of care. The answer? The Bureau of Prisons can treat anything.

Every federal institution purports to provide basic medical and mental health care, either through staff employed at the institution or providers from the surrounding community. Those inmates requiring chronic or specialized care are housed at one of the seven aforementioned Federal Medical Centers.²⁶ And, despite troubling evidence of substandard care²⁷ and mounting costs²⁸, the BOP steadfastly asserts that it can provide treatment consistent with prevailing community standards to virtually every individual placed under its custody. Defense counsel must therefore exercise caution, especially where a medical departure is sought. There is precedent for the United States Attorney's Office requesting, and courts granting, a defendant's referral to the BOP for a pre-sentencing evaluation — a process, alone, that can prove highly detrimental to a client's health given the stress and rigors involved.

Where the Probation Office incorporates medical or mental health information into the PSI, and the Court does not depart, the BOP may also initially designate an offender to a Federal Medical Center for a clinical evaluation. For those anticipating designation to a camp or FCI (Low), such a deviation can cause extreme discomfort and anxiety because FMCs are Administrative facilities, meaning that they house inmates of all security levels within the same

general population. Should FMC evaluators conclude that the individual's condition is not sufficiently severe or chronic as to warrant permanent FMC designation, she is then transferred to a standard facility. All too often, this practice exemplifies the concept of 'diesel therapy': weeks in transit being shipped between regional state jails while shackled in the back of a van until finally reaching the designated institution. Beyond hardship on the individual involved, the process exacts a tremendous toll on the family.

The RDAP: Useful Treatment and Time Reduction

In 1988, the Bureau of Prisons created an intensive 'inpatient' treatment program to help the increasing number of federal inmates with diagnosable, moderate-to-severe substance abuse problems.²⁹ Notably, the now celebrated potential one-year reduction in sentence available to program graduates³⁰ did not go into effect until 1996, after Congress, in recognition of the fact that treatment lowers recidivism, created the time incentive to encourage federal inmates with drug or alcohol abuse histories to begin the road to recovery and rehabilitation before release from federal custody. Congress's action has had its desired result. Each year, an increasing number of federal inmates of all backgrounds and security levels seek

admission into the bureau's ten-month Residential Drug and Alcohol Program (RDAP), which is offered at various institutions throughout the country.

Participation in the RDAP is voluntary. Trained clinical staff review each interested inmate's application and analyze every candidate's drug and alcohol history to determine if it meets the criteria for alcohol or drug dependency delineated in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV)*.³¹ While an applicant's dependency need not be linked to his offense conduct, a diagnosable problem must (a) have existed within the year preceding arrest or, if no arrest, prior to indictment and (b) must be corroborated by the PSI or similar documentation in the central file. Eligibility for a reduction in sentence is *not* among the criteria for admission. The RDAP is a clinical program; sentence reductions are administrative determinations made subsequent to program completion. Each qualified inmate's name is placed on a waiting list, which is governed by projected release date rather than date of acceptance.³² RDAP participants are not commonly admitted until within 20-to-24 months of release, and because the program is not available at every institution, a transfer is often required. Once the program starts, participants are segregated from the

institution's general population. Employment and educational programming continues; however, daily emphasis shifts to counseling strategies designed around each individual's total recovery from alcohol and drug dependency that are intended to compel inmates "to identify, confront, and alter the attitudes, values, and thinking patterns that lead to criminal and drug-using behavior."³³ The inpatient component is followed by aftercare recovery at a Community Corrections Center (CCC or "halfway house") and a rigorous term of supervised release that includes such added conditions as group counseling and random urinalysis, as well as a lower violation threshold.³⁴

For many years the bureau lacked empirical support for its historical argument that "(d)rug treatment is a particularly important program in the BOP because it is generally accepted that drug abusers who redirect their lives are less likely to recidivate."³⁵ Recent research bears out the supposition, though. A comprehensive three-year follow-up study undertaken by the bureau's Office of Research and Evaluations shows that male inmates who successfully complete the RDAP were 16 percent less likely to be re-arrested or revoked than cohorts who went untreated. Moreover, male RDAP graduates were 15 percent less likely to use drugs.³⁶ In sum, the RDAP is a multiphasic

treatment program from which individuals suffering from substance abuse issues can derive substantial benefit in preparation for community re-entry.³⁷

Boot Camp: A Shorter, More Arduous, Sentence

The other avenue through which a federal inmate can gain a prison-based sentence reduction is the BOP's six-month Intensive Confinement Center program (ICC or "boot camp"), successful completion of which can result in up to a six-month sentence reduction.³⁸ Traditionally, shock incarceration programs were conceived of as alternatives to imprisonment for first-time youthful offenders. Proponents believed that this class of offenders would benefit from the highly structured, military style regimen underlying "boot camp" programs and, consequently, would be less likely to re-offend. Although studies demonstrated that recidivism rates for those individuals channeled into shock incarceration programs were comparable to their counterparts sentenced to prison or to a juvenile detention facility, the boot camp ideal gained in popularity throughout the 1980s and was adopted by Congress as a component of the BOP via the Crime Control Act of 1990.³⁹ Unlike other shock incarceration programs, the BOP does not use the ICC as an alternative to incarceration or solely to relieve prison

overcrowding. Rather, because a qualified inmate sentenced to a term of imprisonment of no greater than 60 months (five years)⁴⁰ is eligible to participate in the ICC when within the final 24 to 30 months of his sentence, the ICC is more properly viewed as a program through which inmates serve "a shorter, but more arduous term."⁴¹ In addition to sentence length, other admission criteria include that an inmate is eligible for minimum-security placement; that he volunteers for the program; that he is physically and mentally capable; that he is serving his first period of incarceration or has a minor criminal history; and that his offense of conviction is not violent, or a felony including "use of physical force against the person or property of another," "carrying, possession, or use of a firearm or other dangerous weapon or explosives," "a serious potential risk of physical force against the person or property of another," or a "sexual abuse offense() committed upon children."⁴² Moreover, while a judicial recommendation is no longer required to gain admission into the program, the BOP will contact the Court and the government for comments and objections should an inmate without an express recommendation in his Judgment Order seek to enroll. Placement priority is ordinarily given to direct court commitments (persons serving 30 months or less and recommended by the Court). Indeed, individuals sentenced to 30

months or less should make every effort to coordinate self-surrender directly to the next available ICC class so as to avoid designation to another institution and the possibility of a transfer-related admission delay. This can be accomplished by contacting the ICC Administrator before sentencing and obtaining the anticipated start date(s) for the next class(es), which can then be relayed to the Court. Placement priority is also given to “eligible offenders who pose a greater risk of reinvolverment with criminal activity.”⁴³

Age is not a bar to participation, though every ICC candidate must past an enhanced physical exam. The ICC is exceptionally demanding both physically and mentally. The program is characterized by 16-hour work days and six-day work weeks during which participants experience physical conditioning, military drills, work assignments, educational and vocational training, substance abuse and stress management counseling, and other components of a practical life skills/coping curriculum designed around a total-wellness model. According to BOP research analyst Jody Klein-Saffran, Ph.D., the ICC provides a more constructive and rewarding institutional experience:

...ICC inmates are taught to work together as a team, whereas in regular prison this is discouraged. In fact, the unspoken rule of ‘doing

your own time’ remains a strong component of the standard prison culture. At the ICC facilities, correctional officers are expected to establish close working relationships with inmates and gain more knowledge about their charges than would be the case in a typical prison facility.⁴⁴

Upon program completion, ICC graduates are transferred to a halfway house, *see* Note 34, *supra*, and placed in the pre-release module, which is then followed by a period of home confinement prior to the start of supervised release.

Due to the ICC’s increasing popularity, the bureau closely scrutinizes whether each potential and participating boot camp inmate will realize the benefits that the program is designed to provide. Of special note is the BOP’s codification of an informal policy that disfavored ‘white-collar’ offenders except when bed space was otherwise available. Specifically, “[i]nmates who, by virtue of their lack of program needs, do not require the intensive specialized programs offered at an ICC ordinarily are not accepted for ICC placement.”⁴⁵ This includes individuals “demonstrating a stable employment/educational/ military history, etc.”⁴⁶ On occasion, an individual’s offense of conviction might suggest a ‘white collar’ defendant (*e.g.*, stock fraud), but his background demonstrates otherwise (*e.g.*, young adult from

disadvantaged background with high school education and limited work history). In such instances, present information to the Probation Office and the Court prior to sentencing so that the inconsistency is reflected in the PSI and any judicial recommendation. Making a factual record is especially important in light of a body of anecdotal evidence showing that some inmates placed in the ICC are later removed when a review of their file reveals incompatibility between their backgrounds and the program's intended purpose.

Furloughs

The forced separation from loved ones is one of the most difficult aspects of incarceration. Feelings of isolation or hopelessness are most poignant when families gather together during times of special significance or crisis. The BOP recognizes the inherent hardships of imprisonment and offers qualified inmates furloughs (authorized, unescorted absences from federal institutions) in an effort to advance correctional goals.

There are two kinds of furloughs: "the day furlough" and "the overnight furlough" – another kind of authorized absence popularly known as an "unescorted transfer" or "furlough transfer" is also technically a furlough. The bureau makes clear that a furlough is not right, but a privilege.⁴⁷ And, while

furloughs should not be viewed as rewarding good behavior, they are less frequently given to those who demonstrate poor behavior or, more precisely, those whose conduct is inconsistent with defined BOP rules. A day furlough consists of a trip to a location within 100 miles of the granting institution that lasts no more than 16 hours and ends before midnight.⁴⁸ Because the stated purpose for day furloughs is "to strengthen family ties and to enrich specific institution program experiences," they are typically granted to inmates wishing to attend a momentous family event (*e.g.*, a child's wedding) or to engage in institution-sponsored activities within the community.⁴⁹

Technically, overnight furloughs *can* extend to 30 days when unique circumstances present themselves⁵⁰, but they ordinarily last three (3) to seven (7) days.⁵¹ Moreover, unlike day furloughs, there are no stated restrictions on the proximity of an inmate's overnight furlough destination from her designated federal facility.

No matter the furlough type, a federal inmate remains under BOP custody even when away from the institution. This means (a) that furloughed inmates are still expected to adhere to prescribed rules (*e.g.*, no marriages or driving without prior, written staff approval)⁵²; (b) that sanctions can be imposed for rules violations committed away from the

institution⁵³; (c) that failure to timely return to the institution makes one an “escapee”⁵⁴; and (d) that time spent on furlough is credited towards one’s sentence – a furlough does not extend an inmate’s projected release date or sentence.⁵⁵ Another noteworthy consideration is that the costs and responsibilities of furloughs (*i.e.*, transportation, lodging, food) are borne by the inmate and/or his family.⁵⁶

Before an inmate is considered for a furlough, she must generally (a) be listed as community custody; (b) be deemed physically and mentally capable; (c) have demonstrated “sufficient responsibility” so as to assure compliance with furlough requirements; and (d) (1) be within two years of anticipated release for a day furlough, or (2) be within 18 months of anticipated release for an overnight furlough to a location within the institution’s “commuting area,” or (3) be within 12 months of anticipated release for an overnight furlough outside of the commuting area.⁵⁷ Furthermore, furloughs are generally unavailable to inmates convicted of serious crimes against the person or those “whose presence in the community could attract undue public attention, create unusual concern, or depreciate the seriousness of the offense.”⁵⁸ This includes, but is not limited to, those convicted of “crimes of violence”⁵⁹; those under an assigned Public Safety Factor; those who refuse to participate in the Inmate Financial Responsibility Program or other

programming, including GED and drug treatment; and those with escape histories.⁶⁰ One notable exception is the “Emergency Furlough”, which permits attendance to “a family crisis or other urgent situation.” These furloughs are available to an inmate confined at his initially designated institution for less than 90 days as

Transfers

In terms of facility transfer, the issue is usually one of whether it can be obtained rather than how it will occur (unescorted *v.* escorted). As a general rule, once placed at a particular institution, a federal inmate is not eligible for transfer until she has demonstrated 18 months’ infraction-free conduct.⁶¹ Even then, transfers are usually limited to compelling reasons. Nearly every BOP institution is overcrowded, and wardens, who approve transfers, are not inclined to accept additional inmates absent unique circumstances. The most persuasive arguments for movement usually rest on the distance between a given inmate and her family. Unless advised otherwise, the BOP ordinarily equates the ‘legal address’ found in an inmate’s PSI to her ‘release residence’, the place she intends to return following release. Accordingly, the bureau attempts to adhere to the 500-Mile Rule, *supra*, and place inmates within proximity to their release residences, though the rule occasionally succumbs to

other relevant considerations, such as overcrowding or the presence of co-defendants. An individual seeking to transfer to another facility needs to demonstrate to her Unit Team why the move is necessary and appropriate. This can include providing a letter from a parent explaining difficulties in visitation related to distance, cost, or medical considerations or from a spouse confirming a new release residence. The latter is especially important when an inmate's 'legal address' has no bearing on the location to which she seeks release inasmuch as it implicates potential transfer of supervision issues (*i.e.*, different Probation Offices) that must be addressed as part of the BOP's pre-release planning.

Except for change in an inmate's security level, transfers will only be made to institutions of commensurate security (*e.g.*, Low to Low). Where escorted transfers are called for, the process can be extended and arduous. Take for example a former client from South Florida housed at FCI Coleman-Medium, Florida whose security level was reduced to Low. A request was made for transfer to FCI Coleman-Low, a simple matter of walking across the street. Instead, the bureau transported the individual to FCI Yazoo City-Low, Mississippi via the Federal Transfer Center in Oklahoma City. The process took more than six weeks, during much of which he was unable

to communicate with family. If that were not enough, the individual was ultimately placed at Coleman-Low to complete his sentence. So, while transfers can ease personal pressures, the process may serve to temporarily exacerbate them.

Final Thoughts & Quick Tips

The following are some final tips to keep in mind:

Remember Discretion: The program statements that govern federal correctional management are subject to wide ranging interpretation. Though largely consistent across the system, an issue sometimes boils down to individual decisions. As an example, do not think that obtaining a furlough is as easy as described above. It is a subjective process contingent on a warden's discretion. *Silence is Golden:* As hard as the concept seems for some, it is essential clients realize that complaining normally does more harm than good once incarcerated. To the extent forceful advocacy is needed, it is best handled from the outside.

Communication Considerations: As of April 1, 2001, federal inmates are only allowed 300 minutes of telephone use per month. While attorney calls made with the assistance of the Unit Team (*i.e.*, on a private line) do not fall within this restriction, it is impractical for most inmates not to use their allotted

phone time to speak with their attorneys. Also, when on a 'legal call,' make sure to ask your client whether a staff member can listen in; counselors often sit at their desks during these calls. When sending legal mail, mark the envelope "Special Mail: Open Only in the Presence of Inmate" and to write or type your name, followed by "Attorney-At-Law" on the envelope. Mail from a law firm, or a defender's office, is not considered legal mail, and do not assume the person opening the envelope knows the meaning of Esquire.

Finding a Client: For those tired of long calls to the BOP's Inmate Locator [(202) 307-3126], the service is now available on-line at <http://inmateloc.bop.gov/locator/FindInmateHttpServlet>. It requires either the inmate's Register, DCDC, FBI or INS Number or the individual's first and last name. The result will provide an inmate's name, age, race, sex, projected release date and location, with facility phone number.

A Year is A Year: Offenders sentenced to one year will serve one year; good conduct time is not given to inmates serving a sentence of one year or less. Individuals sentenced to 12 months and one day receive full good time credit.

In closing, the following resources are recommended for those interested in additional information or assistance. First, the bureau's Web site: www.bop.gov, is an

invaluable source of information that can provide quick and easy answers to many questions. Second, numerous helpful publications can be obtained from the BOP's Public Information Office [320 First Street NW Washington, D.C. 20534]. And, third, clients, who, once inside, quickly learn about prevailing rules, both formal and informal. Although there are a growing number of 'guidebooks' and 'prison consultants' professing an 'insider's perspective,' approach with caution. 'Guidebooks' can be expensive, and most offer information freely available elsewhere. Likewise, while some 'consultants' are familiar with the system, avoid those who promise the world, opting instead for those with established reputations, a number of whom are sentencing advocates or mitigation specialists who can assist early in the process.

Notes

¹ See Douglas C. McDonald and Kenneth E. Carlson, *Federal Sentencing in Transition, 1986-90* (USDOJ-BJS: June 1992) (52% of federal offenders sentenced to prison in 1986 versus 74% in 1990).

² USDOJ-BJS, *Correctional Populations in the United States, 1988*, p. 58, Table 5.1 (GPO: March 1999).

³ USDOJ-BOP, *Weekly Population Report* (March 25, 2004).

⁴ Kathleen Hawk Sawyer, *Statement of the Director, Federal Bureau of Prisons Before the Senate Subcomm. on Criminal Justice of the Judiciary Comm.* (April 6, 2000) (Dr. Sawyer has retired, succeeded, on April 4, 2003, by

Harley Lappin).

⁵ USDOJ-BOP, *The Bureau in Brief* (Apr. 2002). The “102 facilities” is current as of September 30, 2002 and does not include private, contract facilities.

⁶ “Club Fed” is arguably the single greatest misnomer attached to federal prisons. To the extent that minimum-security federal prisons exist and continue to be built, it is because the level of security provided is consistent with the negligible risk of violence or escape posed by the populations they house. The expenditure of additional taxpayer dollars merely to house camp inmates in more secure facilities would be wasteful and counterproductive. Furthermore, whereas the notion of country club prisons is most often associated with affluent white-collar offenders, drug offenders actually comprise more than 73 percent of the FPC population. USDOJ-BOP, *State of the Bureau 2002* at 58.

⁷ USDOJ-BOP, *About the Federal Bureau of Prisons* (Oct. 2000).

⁸ This article deliberately avoids detailed discussion of the bureau’s administrative remedy process inasmuch as it offers modest redress for most inmate grievances. Those wishing further information may wish to review the BOP Office of General Counsel’s *Frequently Asked Questions* Web page at <http://www.bop.gov/ogcpg/ogcfaq.html>.

⁹ See <http://www.bop.gov/foiapol.html>.

¹⁰ See, e.g., *Lopez v. Davis*, 121 S. Ct. 714 (2001) (upholding use of BOP program statement that categorically denies early release to federal inmates whose crime involves, albeit peripherally, possession of a firearm despite statutory allowance permitting sentence reduction to nonviolent offenders who successfully complete residential substance abuse treatment program).

¹¹ A listing of Community Corrections Offices and the districts they serve can be found at <http://www.bop.gov/facilnot.html#ccc>.

¹² USDOJ-BOP, Program Statement No. 5100.07, *Security Designation and Custody Classification Manual*, Ch. 3, p. 3 (Jan. 31, 2002).

¹³ See, e.g., P.S. 5100.07, Ch. 5, pp. 5-14.

¹⁴ Other PSFs include Serious Telephone Abuse and Juvenile Violence, both added in January 2002; Disruptive Group (male only); Threat to Government Officials; Violent Behavior (female only); Serious Escape (female only); and Prison Disturbance. P.S. 5100.07, Ch. 7.

¹⁵ P.S. 5100.07, Ch. 7, p. 1 and Appendix B, p. 1.

¹⁶ P.S. 5100.07, Ch. 7, p. 4.

¹⁷ P.S. 5100.07, Ch. 7, p. 2. PSF not applied if previous case was *nolle prosequi* or dismissed but is if conduct underlying conviction involved inappropriate sexual behavior.

¹⁸ USDOJ-BOP, Program Statement No. 7310.04, *Community Corrections Center (CCC) Utilization and Transfer Procedure*, Ch. 10(a) (Dec. 16, 1998) (inmates assigned Sex Offender PSF “shall not ordinarily participate” in CCC program).

¹⁹ P.S. 5100.07, Ch. 7, p. 3.

²⁰ P.S. 5100.07, Ch. 7, pp. 9-14.

²¹ See *State of the Bureau* <http://www.bop.gov/ipapg/ipasob2002.pdf> (.pdf document) or the .html directory <http://www.bop.gov/facilnot.html#fac>.

²² See <http://www.bop.gov/weekly.html>.

²³ Nearly all federal correctional institutions operate above rated capacity, so the question is one of degree: Is the institution in question capable of accept an additional inmate or does sound management policy argue for designation to a relatively less crowded facility?

²⁴ 18 U.S.C. §3621(b)(4).

²⁵ USDOJ-BOP, *Judgment and Commitment Orders in Legal Resource Guide to the Federal Bureau of Prisons*, p. 13 (2003); see P.S. 5100.07, Ch. 7, p. 11 (outlining use of “Judicial Recommendation” management variable). Where the BOP is unable to comply with a judicial recommendation, it must so notify the Court. USDOJ-BOP, Program Statement No. 5070.10, *Judicial Recommendations and U.S. Attorney Reports, Responses to* (June 30, 1997).

²⁶ These are FMC Butner, North Carolina; FMC Carswell, Texas; FMC Devens, Massachusetts; FMC Fort Worth, Texas; FMC Lexington, Kentucky; FMC Rochester, Minnesota; and the Medical Center for Federal Prisoners (MCFP) Springfield, Missouri. Of the seven, FMC Carswell alone serves female inmates. Also, FMC Devens and FMC Fort Worth provide services to geriatric inmates.

²⁷ See, e.g., USGAO, *Bureau of Prisons Health Care: Inmates’ Access to Health Care is Limited by Lack of Clinical Staff* (1994); Elizabeth Alexander, Associate Director for Litigation, National Prison Project, *Testimony Before the House Comm. on the Judiciary, Subcomm. on Intellectual Property and Administrative Justice* (July 1991).

²⁸ Richard M. Stana, Associate Director Administration of Justice Services-General Government Division, *Federal Prisons: Containing Health Care Costs for an Increasing Inmate Population, Statement of to Subcomm. on Criminal Justice Oversight* (USGAO: April 6, 2000).

²⁹ USDOJ-BOP, *Drug, Alcohol, and Related Treatment Programs in A Judicial Guide to the Federal Bureau of Prisons*, p. 37 (1995) (“30.5 percent of Federal inmates have moderate to severe substance abuse problems, and this figure is sure to increase”).

³⁰ See 18 U.S.C. §3621(e).

³¹ USDOJ-BOP, Program Statement No. 5330.10, *Inmate Drug Abuse Programs Manual*, Ch. 5.4.1(a)(1), pp. 3-4 (Oct. 9, 1997).

³² P.S. 5330.10, Ch. 5.4.1(a)(4), p. 4.

³³ Pelissier, et al., *Triad Drug Treatment Evaluation*, 65 Federal Probation 3, 3 (Dec. 2001)

³⁴ In spite of BOP rule changes concerning the use of halfway houses in December 2002, RDAP and ICC, *infra*, graduates are still afforded a full six months’ halfway house before release from federal custody.

³⁵ *1995 Judicial Guide* at 37.

³⁶ *Triad Drug Treatment Evaluation* at 6 (female RDAP graduates 18 percent less likely to re-offend or use drugs).

³⁷ Every BOP institution offers a 40-hour outpatient treatment program, which is mandatory for certain classes of offenders. P.S. 5330.10, Ch. 4. There are no sentence reductions associated with completion of this program, and participation does *not* affect RDAP eligibility.

³⁸ There are three ICC programs currently operating: ICC Lewisburg, Pennsylvania and ICC Lompoc, California for men and ICC Bryan, Texas for women.

³⁹ See 18 U.S.C. §4046; 1990 U.S. Code Cong. and Admin. News 6472.

⁴⁰ USDOJ-BOP, Program Statement No. 5390.08, *Intensive Confinement Center (ICC) Program*, Ch. 8(a), pp. 4-5 (Nov. 14, 1999).

⁴¹ 1990 U.S. Code Cong. and Admin. News 6472, 6558.

⁴² P.S. 5390.08, Ch. 8(a), pp. 4-5.

⁴³ P.S. 5390.08, Ch. 8(b), p. 5.

⁴⁴ Jody Klein-Saffran, Ph.D., *Bureau of Prisons: Expanding Intermediate Sanctions Through Intensive Confinement Centers in Correctional Boot Camps: A Tough Intermediate Sanction* (NIJ: 1996).

⁴⁵ P.S. 5390.08, Ch. 8(b), p. 6.

⁴⁶ *Id.*

⁴⁷ USDOJ-BOP, Program Statement No. 5280.08, *Furloughs*, Ch. 1 (Feb. 4, 1998).

⁴⁸ P.S. 5280(6)(a)(1).

⁴⁹ *Id.*

⁵⁰ See 18 U.S.C. §§ 3622, 4082.

⁵¹ P.S. 5280.08(1).

⁵² P.S. 5280.08-Table 1.

⁵³ P.S. 5280.08(12).

⁵⁴ *Id.*

⁵⁵ P.S. 5280.08-Table 1.

⁵⁶ P.S. 5280.08(8).

⁵⁷ P.S. 5280.08(9).

⁵⁸ P.S. 5280.08(10).

⁵⁹ USDOJ-BOP, Program Statement No. 5162.04, *Categorization of Offenses* (Oct. 9, 1997) (defines “crimes of violence”).

⁶⁰ P.S. 5280.08(10).

⁶¹ P.S. 5100.07, Ch. 10.

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A CLOSER LOOK AT THE RESIDENTIAL DRUG ABUSE TREATMENT PROGRAM(DAP)
Janet Hinton, Paralegal, (FPD-E.D.MO) and Robin Butler, Secretary (FPD-S.D.IL) Updated November 2003

Eligibility Requirements

-Voluntary

- Must have no more than 36 months left to serve and sufficient time to complete program (normally 15-18 mos.)

- Must have verifiable & documented substance abuse or dependence meeting diagnostic criteria in DSM-IV for alcohol or drug disorder;

- Assessment by BOP program staff indicates drug problem and the

diagnosis is supported by PSR *or* other documentation in central file;

- Documentation must indicate defendant's use of same substance for which diagnosis of abuse or dependence was made by interviewer;
- "Positive urinalysis" in institution is insufficient corroboration
- Must sign participation agreement
- Prior convictions have no effect on participating

Disqualifiers

- Not within 36 months of release or not enough time to complete program;
- Serious mental disabilities that would interfere with or preclude full participation;
- security level is inappropriate to DAP facility

NOTE: DAP Coordinator "shall" initiate request for redesignation & application of "management variable" to Regional Designator for program participation

Inmates with physical disabilities may qualify if they are:

- otherwise qualify
- able to participate fully
- able to be held accountable
- eligible for CCC or home confinement

Program Structure

RESIDENTIAL PHASE: Housing in separate unit for 6-12 months, 500 hours, treatment program with

individual & group activities, study, & counseling;

INSTITUTION TRANSITIONAL

PHASE: general population; requiring min. 1-hour a month for 12-month period or until release after residential phase (n/a if scheduled for transfer to CCC prior to completing this); and/or

COMMUNITY TRANSITIONAL

PHASE: up to 6 mos. upon transfer to CCC or to home confinement;

Incentives:

- early release [per § 3621(e)] up to 1 year prior to expiration of sentence
- cash awards
- better living quarters
- Warden "strongly encouraged" to approve those who complete program for the max 180-day period of community custody

Withdrawal/Expulsion

- Voluntary withdrawal
- Mandatory expulsion by warden or DAP Coordinator based on disruptive behavior related to program or
- May be expelled if found to have used or possessed alcohol or drugs, violence or threatened violence against staff or inmates, or committed a serious (100-level) prohibited act;
- readmittance based on application to BOP staff;
- Withdrawal or removal can result in transfer back to prior institution if transferred to DAP

-if readmitted, no credit given for prior participation

Early Release Criteria

- Successful completion of residential DAP

- Current offense cannot be:

(A) a listed "crime of violence" per BOP Categorization of Offenses policy¹, or

(B) designated at BOP Director's discretion as precluding early release², i.e., a felony that:

(1) has as an element the actual, attempted, or threatened use of physical force against the person or property of another; or

(2) that involved the carrying, possession, or use of a firearm or dangerous weapon, explosives including convictions under §§ 922(g), 924(c); 924(e); or

(3) that by its nature or conduct presents a serious potential risk of physical force against the person or property of another; or

(4) that by its nature or conduct involved sexual abuse offenses of children; and

¹ See BOP Program Statement 5162.04, Categorization of Offenses, Section 6 ("Offenses Categorized as Crimes of Violence") (10/9/97); 28 C.F.R. § 550.58 (10/15/97)

² See *Id.*, PS 5162.04, Section 7 ("Offenses that at the Director's Discretion Shall Preclude an Inmate's Receiving Certain Bureau Program Benefits")(10/9/97), 28 C.F.R. § 550.58 (a)(1)(vi) (10/15/97)

(5) offenses for which Sentencing Guidelines base offense level was enhanced for use or threatened use of force or for which specific offense characteristic was applied for possession of weapon or use of force was implicated

- Prior felony or misdemeanor conviction for homicide, forcible rape, robbery, aggravated assault or child sex abuse offense precludes early release benefit;

- Ineligible if: INS detainee contractual boarder (D.C., state, or military) pretrial prisoner "old law" prisoner ineligible for community confinement found guilty of disciplinary violation involving alcohol/ drugs, violence/ threats or 100-level prohibited act since completion of residential phase

Early Release Factors

-Reduction not to exceed 12 months per 18 U.S.C § 3621(e);

-if less than 12 months left to serve on sentence, early release may not exceed amount remaining;

-if detainer exists and cannot be resolved by staff, prisoner is required to participate in institution transitional phase for at least 180 days before early release to detainer is allowed

- Parole eligible prisoners who complete residential 6-12 month program may, at PC discretion, be

eligible for advanced release date via Superior Program Achievement award.

Locations

Northeast Region

FPC Allenwood (PA); Male; Min.
FCI Danbury (CT); Fe; Low
FCI Fairton (NJ); Male Low
FCI Fort Dix (NJ); Male; Low
FPC McKean (PA); Male; Min.
FMC Devens (MA); Male; Admin.

North Central Region

FCI Florence (CO); Male; Admin.
FCI Englewood (CO); Male;
Med./ Admin.
FPC Florence (CO); Male; Min.
FPC Leavenworth (KS); Male; Min.
FCI Milan (MI); Male; Low/ Admin.
FCI Sandstone (MN); Male; Low
FCI Waseca (MN); Male ; Min.
FPC Yankton (SD); Male; Min.
FCI Oxford (WI); Male; Med.

Mid-Atlantic Region

FMC Lexington (KY); Male; Admin.
FPC Cumberland (MD); Male; Min.
FCI Butner (NC); Male; Med.
FPC Beckley (WV); Male; Min.
FPC Alderson (WV); Fe.; Min.

South Central Region

FCI El Reno (OK); Male; Med.
FMC Fort Worth (TX); Male; Admin.
FPC Byran (TX); Female; Min.
FCI Bastrop (TX); Male; Low
FCI La Tuna/FSL El Paso (NM/TX);
Male; Low

FCI Seagoville (TX); Male;
Low/ Admin.
FCI Beaumont (TX); Male; Med.
FMC Carswell (TX); Fe.; Admin.
FPC Texarkana (TX); Male; Low
FPC Beaumont (TX); Male; Med.

Southeast Region

FPC Montgomery (AL); MIN.
FCI Marianna (FL); Male (Med); Fe.
(High)
FPC Talladega (AL); Male; Min.
FPC Eglin (FL); Male; Min.
FCI Tallahassee (FL); Fe. (Low); Male
(Admin)
FCI Coleman (FL); Male; Low
FCI Miami (FL); Male; Min.
FCI Jessup (FL); Male; Low
FPC Edgefield (SC); Male; Min.

Western Region

FCI Phoenix (AZ); Male; Med.
FPC Phonenix (AZ); Female; Min.
FCI Dublin (CA); Fe. (Low); Male
(Admin.)
FPC Dublin (CA); Fe.; Min.
FCI Lompoc (CA); Male; Low
FCI Terminal Island (CA); Male;
Med.
FPC Sheridan (OR); Male,
Med/ Admin.
FPC Nellis (CA); Male; Min.

CLARIFICATION REGARDING VOLUNTARY SURRENDER

In March 2003, BOP issued a notice clarifying their designation scoring of voluntary surrenders. According to the notice, the three point reduction for own recognizance release (OR) only applies when a

defendant is released on his own recognizance with no bond, either secured or unsecured and no home confinement and is allowed to voluntarily surrender.

The defendant can still receive the three point reduction if prior to or at the time of sentencing the bond and/or home confinement condition is removed and the defendant is allowed to voluntarily surrender.

The bottom line is in order to get the three point reduction for voluntary surrender the defendant should be released with no bond (secured or unsecured) and no obligation (financial or home confinement).

CONFRONTING AND ELIMINATING PRISON SEXUAL ABUSE

Introduction

On September 4, 2003, President Bush signed the Prison Rape Elimination Act into law. The signing represented the first major Congressional effort to address an epidemic in our nation's prisons. The law seeks to reduce prison sexual abuse and has three major components. First, it requires that the Department of Justice conduct an annual comprehensive review and analysis of prison sexual abuse and rape. Until now statistics on prison rape have been unreliable largely due to embarrassment and fear of retribution by the rapists and even prison officials. Second, it creates a

prevention and prosecution program. The program will serve as a "national clearinghouse" to provide information and training to federal and state authorities responsible for the prevention, investigation, and punishment of prison rape. Finally, the Act provides an annual grant to state and local officials to fund the prevention and punishment of prison rape.

The law is still in the early stages of implementation, and it will be some time before the law begins to provide tangible results. The law's first step is simply to establish a rape reduction committee that will for the next two years gather information on prison rape. After two years, the committee will then publish national guidelines on how to further implement the other portions of the bill. However, the law is an important first step in confronting and eliminating prison sexual abuse.

In 1994, the Supreme Court held that prison officials can be held liable in constitutional tort actions if a prisoner is raped and the officials exercised "deliberate indifference." Inmates have been able to bring subsequent successful actions against prison officials. So hopefully, the risk of civil litigation coupled with the Rape Elimination Act can finally bring about meaningful change.

Understanding and Predicting Prison Rape

Authors Christopher D. Man and John P. Cronan write, “[s]exual abuse in prison is one of America’s oldest, darkest, and yet most open secrets.” They assert that “most sexual acts in prison are coerced products of dominance, intimidation, and terror.” Prison sexual assault has its own norms and rules known both to the inmates and the guards. For example, the prison rapist may not consider himself a homosexual but the victim of the rape will be perceived by others as a homosexual. Man and Cronan assert that since prison strips individuals of many of the things associated with manhood like wage earning or material items, inmates are left to intimidation and aggression to assert their manhood. Manhood then becomes one of the most important commodities in prison.

According to Man and Cronan, both victims and perpetrators are relatively easy to identify. Physical appearance (race, age, existence/nonexistence of feminine characteristics, and physical size) and personal history (new inmates, prior life, nature and length of conviction) are important predictors with regards to prison rape. For example, a young, white feminine appearing male in prison for the first time from a middle class background would be highly susceptible to sexual abuse.

Legal Challenges for Victims of Prison Rape

Dee Farmer fit the above profile almost perfectly. At age 18, Dee Farmer was convicted and sentenced to the federal prison in Oxford, Wisconsin. Prior to conviction, Farmer had begun the process to change from a man to a woman. So at the time of his incarceration, he was a preoperative transsexual who had long hair, wore women’s clothing, and had even underwent hormone therapy and received breast implants. He continued hormone replacement therapy while in prison. He was transferred to the Terre Haute facility in 1989 for disciplinary reasons and within two weeks of his arrival, Farmer was beaten and raped by another inmate.

Shortly after the rape, Farmer filed an action against the government claiming that their failure to protect him violated his Eighth Amendment right against cruel and unusual punishment. Such constitutional tort actions are allowed under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), and can include compensatory and punitive damages. There are equivalent provisions to bring actions against state run prisons under 42 U.S.C. § 1983.

Prior to Farmer’s claim, courts had applied a “deliberate indifference” standard for when prison officials allowed inmates to be harmed by

other inmates. In order to raise an effective challenge under this standard, petitioners had to show that the harm posed a substantial risk to serious harm and then show that prison officials acted indifferently to this risk. The courts applied different mens rea standards for the prison officials that ranged from civil negligence to criminal intent.

In *Farmer v. Brennan*, 511 U.S. 825 (1994), the Supreme Court clarified the “deliberate indifference” standard and held that prison rape was a “substantial risk of serious harm.” So in effect, the Court removed the first prong of Eighth Amendment challenge based on prison rape, leaving petitioners only to prove that officials acted with “deliberate indifference.” The Court likened “deliberate indifference” to criminal recklessness. The Court held that it is a subjective standard, and the petitioner needs to prove that the prison official knew of an excessive risk of inmate health or safety, that the prison official was aware of the risk, but disregarded the risk, and that the official must be aware of the facts from which inferences could be drawn that a substantial risk of serious harm existed, and that the official drew that inference.

It is important to note that the official does not need to be aware of a specific risk, and knowledge of the risk is determined by the trier of fact.

Later decisions have held that this inference can be based on circumstantial evidence. Simply put, prison officials are not free to ignore the conditions or culture of their prisons, and once the prison is aware of the danger, but fails to act, the test is satisfied. So, an inmate can bring a challenge even if there has been no physical harm.

Prognosis and Conclusion

Prison rape and other forms of sexual abuse affect both men and women and occur between inmates and sometimes between inmates and employees.

Whether or not this new awareness and law will effect meaningful change and reform remains unclear at this time. Currently, the law does not address the attitudes of prison employees, nor does it proscribe how to change inmates’ attitudes and behaviors. It is important that the law be seen not as the solution to this problem, but merely as an important first step.

In short, fully implementing prison sexual abuse and rape preventative, investigative, and punitive policies and procedures will produce a more secure prison environment. Such policies and procedures would help to fulfill the BOP’s mission statement of operating a safe and humane environment and help to guarantee the inmate’s constitutional right against cruel and unusual punishment. Even without future

legislation or litigation, increased common sense and minimal empathy by prison officials and their employees would greatly reduce prison sexual abuse and rape.

Useful Resource

Stop Prisoner Rape is an organization dedicated to eliminating prison rape. It provides resources for rape prevention and for rape victims. Contact Information: Stop Prisoner Rape
6303 Wilshire Blvd., Suite 204
Los Angeles, CA 90048
Phone: (323)-653-STOP

Sources

- Christopher D. Man and John P. Cronan, *Forecasting Sexual Abuse in Prison: The Subculture of Masculinity as a Backdrop for "Deliberate Indifference"*, 92 J. Crim. L. & Criminology 127 (2002).
- 12 Corrections Forum Iss. 6, pg. 6 (2003).
- Justice Fellowship, *Summary of Major Provisions of the Prison Rape Elimination Act of 2003*, (July 28, 2003) available at www.pfm.org.
- Farmer v. Brennan*, 511 U.S. 825 (1994).

POTENTIAL CHANGES TO WORK AVAILABILITY IN THE BOP

In 1934, Congress created Federal Prisons Industries also known as UNICOR. In 2002, UNICOR had 111 factories at 71 locations and net

sales that totaled around \$680 million. According to the Federal Bureau of Prisons, UNICOR employs over 22,000 inmates, which is about 25% of the "sentenced, medically eligible" population, paying inmates between twelve and forty cents per hour. UNICOR's goals include giving inmates important job skills, producing goods for the federal government, operating without appropriations, and minimizing the impact on American workers. UNICOR produces materials that range from prison uniforms and furniture to missile and munition components for the Department of Defense.

UNICOR does not receive appropriations, but there is a strong preference in place for the federal agencies to use UNICOR products when applicable. To purchase a UNICOR product elsewhere, the agency must first obtain a special waiver.

The mandatory preference for UNICOR has been an increasing source of controversy. Some believe that UNICOR harms American workers and industries in the textile field. In 2001, Congress removed the mandatory source requirement for the Department of Defense. Congress now seeks to remove the mandatory source requirement from all goods produced by UNICOR. UNICOR then risks to lose this preference and that loss could place UNICOR in jeopardy.

Late last year, the House of Representatives passed the Federal Prison Industries Competition in Contracting Act. Currently, the bill is in the Senate Judiciary Committee. The Competition in Contracting Act or H.R. 1829, would allow federal agencies to contract with private companies. Simply put, agencies would have the choice to purchase UNICOR products, rather than a mandate. Furthermore, UNICOR products would have to pass the same quality protocols to which private industries are subjected. Inmates though would receive a raise in the minimum wage to \$2.50 per hour. The bill also provides for alternative avenues for UNICOR to seek out other inmate employment opportunities.

The impact that the passage of the bill on the American workforce is open to debate. First, of the \$680 million that UNICOR netted in sales in 2002, about 74% of that total went towards purchasing raw materials from the private sector. Many of these private sector companies were from female or minority owned companies. Second, there is no apparent provision in the bill that federal agencies contract only with American companies or for products made by American workers.

Although the impact on American workers is suspect, weakening UNICOR could be devastating to inmates. UNICOR study reports that inmates that work for UNICOR

are 14% more likely to find employment upon release, and those that work and participate in apprenticeship programs are then 24% less likely to commit future crimes. Also about \$3 million of UNICOR's net sales go towards their employees' financial obligations like fines and restitution.

At this point, passage of the bill seems likely. Although the bill has honorable intentions, it serves as another slap to inmates who wish to use their incarceration time productively and learn job skills to make them productive citizens upon release.

Sources

-*Legal Resource Guide to the Federal Bureau of Prisons*, pg. 23 (2003), available at www.bop.gov.

-Joseph Summerill, *Congress Aims to Further Reform UNICOR*, 65 *Corrections Today* Iss. 6, pg. 139 (2003).

-Karen M. Koenig, *Office Furniture Industry Pins Hopes on 2004 Recovery*, 108 *Wood & Wood Prod.* Iss. 13 (2003).

POSITIVE ATTITUDE DEVELOPMENT PROGRAM

Lyle Wildes, an inmate at the federal prison camp in Duluth, writes of his experience with a positive mental attitude based on Og Mandino's *The Greatest Salesman*. Over the years, in cooperation with prison staff, he has taught a course dedicated to

developing and maintaining a positive attitude while in prison. He has now been involved with the program for thirteen years and has run programs at three different federal facilities, and continues to facilitate three levels of a positive attitude development program (PAD). He writes that the programs have been well received by inmates, with some taking the course multiple times.

The program itself has varied in length and substance, but it focuses on understanding and applying Og Mandino's ten principles for a positive mental outlook. Typically, it is a twenty week, one hour per week course that will spend two weeks per principles. The principles includes things like, "Today, I begin a new life," or "I will persist until I succeed," or even "I will laugh at the world." Each principle or scroll then provides steps on how to carry out and embrace the particular tenet. Upon completion of the program, Mr. Wildes usually has a graduation ceremony with a certificate and guest speaker. At one ceremony, he even had Jim Tressel, the Ohio State Football coach deliver a speech.

The program has been slow to catch on elsewhere, largely due to a lack of an inmate willing to run such a program; however, a program like this is useful, beneficial program for inmates that can improve the quality of their life in prison and upon release. Mr. Wildes has a powerful

point, "All of us want a better, more self productive life; there can be no doubt it starts with developing our own attitude, even while incarcerated."

The official Og Mandino Website is available at www.ogmandino.com.

SPEAKING UP AT SENTENCING

Michael G. Santos, Inmate, FPC Florence. www.michaelsantos.net.

After a defendant has been convicted of felony charges, a probation officer will thoroughly review the offender's history and prepare a non argumentative report for the court's consideration. Then, the judge will set a sentencing date. Once the judge establishes that all-important date, the offender should consider whether he will make a statement before the judge imposes sentence. This decision, one of great consequence, must not be made in haste.

An offender ought to appreciate the fact that before judges proceed to the bench, they attend law school and enjoy careers as lawyers. Judges, better than most people, understand that attorneys are professional advocates, capable of debating either side of an issue. Indeed, sentencing judges frequently listen to attorneys describe their clients as candidates for sainthood; one can be sure the even Charles Manson and other notorious felons had attorneys who

argued passionately about their clients redeeming qualities.

What judges rarely hear is an offender who expresses remorse for breaking laws against society. Such statements can be much more influential than the most eloquent pleas by counsel. An offender should realize the powerful impact a formal expression of remorse can have at sentencing, then decide how he wants to approach the proceeding.

Although an offender's opportunity to address the court at sentencing may influence the judge's sentence, many offenders choose to remain silent and allow counsel to speak for them. In this writers' opinion, such a decision is a mistake, one that can be measured in a longer prison sentence.

I have been confined since 1987. During that time I've frequently been asked to assist other prisoners who were preparing post-conviction motions through which they hoped the sentencing judge would recognize an injustice and correct it by reducing the offender's sentence. Providing this legal assistance has given me an opportunity to read transcripts from hundreds of sentencing proceedings. Again and again, I read sentencing transcripts where judges state on the record that they were imposing the lowest possible sentence as a result of the offender's acceptance of

responsibility, citing the statement as evidence of the offender's remorse of contrition. Likewise, I've read several transcripts where sentencing judges rebuke offenders who chose to remain mute during their sentencing proceedings.

The U.S. Sentencing Guidelines, which federal judges must follow, provide a sentencing range for every offense. At the low end of the guidelines, sentencing judges have the discretion to impose a monetary fine or probation in lieu of a prison sentence; at the higher end of the guidelines, a judge has the discretion to impose a sentence within a range of many years. As an offender who is serving a 45-year term, I can assure all readers there is a definite advantage to receiving the lower sentence, and an offender's statement made at sentencing may sway the judge to impose a sentence at the low end of his sentencing discretion.

Offenders who choose not to address the court at sentencing usually make this decision in an effort to preserve appellate rights. One of my books left over from law school indicates that in some jurisdictions, as many as 90 percent of the defendants who were convicted after trial and sentenced to prison will appeal their convictions. If an offender decides not to express remorse at sentencing because of concerns that such a statement could hinder an appellate strategy, the offender should

understand the legal system's tendency to let a trial court's decision stand; the judicial system has a thing about "finality" or bringing closure to a case.

According to *Modern Criminal Procedure*, a well known and respected legal treatise, success on appeal varies with the particular appellate court. Generally, appellate courts give great deference to the trial court and the decision of the jury. Indeed, approximately 90 percent of all criminal convictions that resulted from a jury trial are affirmed on appeal. Finding relief through post-conviction procedure is even less fruitful, as courts grant relief to fewer than five percent of the post-conviction motions they receive.

Unfortunately, offenders learn too late that every passing day in the criminal justice system renders an offender's sentence and conviction more immutable. The best time to influence a judge's sentencing decision is before the sentence is imposed, as in nine out of ten cases, offenders never have an opportunity to appear before their sentencing judge again. Accordingly, my experience and observations suggest that offenders should take advantage of the one opportunity they have to express remorse for their criminal behavior.

My suggestion is that the offender work with his attorney in preparing a "sentencing package" for the

judge. The package should contain any type of information the offender has available that might demonstrate the offender's commitment to leading a crime-free, productive life upon release from confinement. The offender might look for opportunities to atone for his criminal actions prior to sentencing and document his efforts for the sentencing judge.

If the offender can muster character references who will attest to the offender's contribution to the community, then those reference letters definitely should be included in the sentencing package. Most important, though, is the offender's written statement to show the sentencing judge that although the offender stands guilty of committing a crime, he is not a recalcitrant; I advise the offender to make every effort to show respect for the law and to substantiate claims of contrition.

Once the sentencing hearing begins, the offender's attorney, the prosecuting attorney, and the probation officer will take turns arguing their issues regarding the presentence investigation report. The next order of business will concern sentencing, with the prosecutor requesting a specific sentence and the defense attorney providing reasons the sentence should be less than the prosecutor's recommendation. Then, before the judge issues the sentence, the

offender will have an opportunity to stand and address the court.

Although each offender must make his or her own decision, I am convinced the benefits associated with an acceptance of responsibility and an expression of remorse far outweigh the perceived benefits of standing stone-faced before a sentencing judge. Eloquence or flowery prose is not nearly as important as sincerity, and offenders may be certain the sentencing judge is not gullible. If one chooses to speak, the best policy is to be truthful and unpretentious.

After the judge passes sentence, the offender might request the judge to rule on collateral matters. Two issues concerning offenders who will be sentenced to prison include payment scheduled for monetary penalties associated with the sentence, and the institution to which the prisoner will be designated to serve his term of confinement.

Regarding any monetary penalties imposed as part of the sentence, the offender may request the court to order the postponement of any payment toward these obligations until the offender is released from prison. The law does not require the judge to make a recommendation either way, but if the judge does not, Bureau of Prison counselors will require offenders to make payments toward these financial penalties from

whatever money is available in a prisoner's commissary account. These payments can be a burden as a prisoner moves deeper into his sentence and financial resources become more scarce.

Also, the sentencing judge may listen to an offender's request to serve his sentence in a particular institution. Some judges will agree to make such recommendations, and the prison system will make an effort to comply with any recommendations made by the judge. It is important to realize, however, that the prison system is crowded and many factors influence the facility where the offender will serve his time. A sentencing judge's recommendation is helpful, but not binding on the prison system.

RESOURCES FOR INMATES

Frequently, Federal Defender Services receives letters from inmates asking for help outside our expertise and mandate. Below is a list of organizations that provide help to inmates in various areas.

Legal Services

1. American Civil Liberties Union (ACLU)

In 1972, the ACLU created the National Prison Project (NPP), an organization dedicated to prisoner advocacy and litigates on behalf of inmates. Over the years, the NPP has represented over 100,000 people. The

NPP litigates issues that involve conditions of confinement, medical care, mental illness, over incarceration, and restrictions on rights. The NPP works out of its Washington D.C. office and in conjunction with other ACLU affiliates.

Contact Information:
ACLU National Prison Project
735 15th St., NW, Suite 620
Washington D.C. 20005
Phone: (202)-393-4930

ACLU of Wisconsin
Executive Director:
Christopher Ahmuty
207 E. Buffalo Street, Suite 325
Phone: (414)-272-4032

ACLU of Illinois
Executive Director:
Colleen K. Connell
180 N. Michigan Ave., Suite 2300
Chicago, IL 60601
Phone: (312)-201-9740

ACLU of Indiana
Executive Director:
John Krull
1031 E. Washington St.
Indianapolis, IN 46202
Phone: (317)-635-4056

ACLU of Minnesota
Executive Director:
Charles Samuelson
1821 University Avenue
Suite N-392
St. Paul, MN 55104
Phone: (651)-645-4097

2. Remington Center

The Frank J. Remington Center is part of the University of Wisconsin Law School and provides several services for Wisconsin state and federal prisoners. The services include:

Legal Aide to Institutionalized Persons Project (LAIP)

LAIP is a legal aid organization run by the University of Wisconsin Law School. LAIP seeks to provide legal assistance to state and federal prisoners throughout Wisconsin. LAIP focuses on family law problems, post-conviction criminal law, sentence credit questions, and resolution of pending fines and charges.

Contact Information:
Professor Meredith J. Ross
Law Building
975 Bascom Mall
Room 4318J Law
Madison, WI 53706-1399
Phone: (608)-262-3764

3. Family Law Project

The Family Law Projects represents both male and female inmates at both the state and federal level in Wisconsin in newly initiated divorce and paternity cases.

Contact Information:

Professor Leslie Shear
Law Building
975 Bascom Mall
Room 4318 Law
Madison, WI 53706-1399
Phone: (608)-262-2030

4. Wisconsin Innocence Project

The Wisconsin Innocence Project provides legal assistance to inmates who have “provable claims that they were wrongly convicted.” The Project works with both state and federal inmates in Wisconsin, but will help inmates in other states if there are “exceptional circumstances.” The Innocence Project only takes cases in which the inmate has exhausted all appeals and remedies that have a possibility of developing evidence that can prove innocence. Examples of cases the Project does not take include: (1) admitting to killing another, but claiming self-defense; (2) admitting to sexual contact, but claiming it was consensual; (3) or being convicted as an accessory, but claiming only a minor role in the crime.

Inmates who wish to apply to the Wisconsin Innocence Project must complete the APPLICATION FOR ASSISTANCE FORM. The form may be requested in writing or downloaded through the Project’s website (see www.law.wisc.edu/FJR/innocence). The Project does not respond to emails or phone calls. After

returning the completed application, the Project will then evaluate the application and determine if the Project will make further inquiries into the inmate’s circumstances. Because of the high volume of requests, response to the application can take several months.

Contact Information:

Wisconsin Innocence Project_Frank J. Remington Center_University of Wisconsin Law School, 975 Bascom Mall
Madison, WI 53706-1399

Health Related Issues

1. Joint Commission on Accreditation of Healthcare Organizations

The JCAHO is a nonlegal avenue to file complaints about inmate health care. The information that JCAHO receives is used to strengthen oversight activities and evaluate healthcare organizations. To file a complaint with JCAHO, please summarize the health issues in one to two pages and include the name, address, city, and state of the prison healthcare provider. The JCAHO will respond to the complaints by informing the writer of the actions taken in response to the complaint.

Contact Information:

Office of Quality Monitoring
Joint Commission on Accreditation of Healthcare Orgs.
One Renaissance Boulevard

Oakbrook Terrace, IL 60181
Phone: 1-800-994-6610
Phone Hours: 8:30-5:00 P.M., Central
Standard Time

2. AIDS Educational Project

The AIDS Educational Project provides educational materials, legal information and assistance to anyone seeking information about AIDS in prison. The AIDS Project publishes free pamphlets for prisoners.

Contact Information:

National Prison Project of the ACLU
1875 Connecticut Avenue NW.
Washington D.C. 20009
Phone: (212)0674-0800

3. Prisoners with AIDS Rights Advocacy

This organization offers support, referrals, education, and political lobbying for prisoners with AIDS.

Contact Information:

Prisoners with AIDS Rights
Advocacy
P.O. Box 2161
Jonesboro, GA 30237
Phone: (404)-946-9346

Books for Inmates

1. Prison Book Program

This program in addition to offering low cost books, includes in each order the National Prisoner Resource List, a comprehensive list of various

outside services for prisoners. The National Prisoner Resource List is also available upon request and a minimal (one dollar) donation is appreciated.

Contact Information:

Prison Book Program
c/o Lucy Parsons Bookstore
110 Arlington Street
Boston, MA 02116-5302

Other Book Programs:

2. Free Books to Prisoners
c/o Serve the People
P.O. Box 29670
Los Angeles, CA 90029-0670

3. Midwest Pages to Prisoners
Project
c/o Boxcar Books & Community Ctr.
310A S. Washington St.
Bloomington, IN 47401-3529

4. Women's Prison Book Project
c/o Arise Bookstore
2441 Lyndale Ave. S
Minneapolis, MN 55405

Miscellaneous

1. Prisoner Resources Clearinghouse

The PRC provides information to prisoners on education, legal issues, medical issues, family support and assistance, and political and economic empowerment.

Contact Information:

Prisoner Resources Clearinghouse
2103 N. Decatur Road, Suite 113
Decatur, GA 30033 Phone: (770)-582-9801

2. Center for the Children of
Incarcerated Parents

The Center provides free educational material for incarcerated parents and their children.

Contact Information:

Center for the Children of
Incarcerated Parents
65 South Grand Avenue
Pasadena, CA 91105
Phone: (626)-397-1300

3. PEN, Writing Program for
Prisoners

PEN offers a free resource list for prisoner writers, and a list of correspondence courses leading to various degree or certificate programs. PEN also offers an annual writing contest for prison writers.

Contact Information:

PEN, Writing Program for Prisoners
568 Broadway
New York, NY 10012
Phone: (212)-334-1660

Directories

1. Directory of Prisoner Resources,
2nd Edition Published by Christian
Pen-Pals

Contact Information:

Christopher Dunn #181654
M.P.S., PO Box 900
Jefferson City, MO 65102

2. Prisoner Support Directory
Published by Prison Activist
Resource Center

Contact Information:

Prison Activist Resource Center
PO Box 339
Berkeley, CA 94701
Phone: (510)-893-4648

CONTACT US

If you wish to submit an article or suggestions for future newsletters, please write to us at:

FEDERAL DEFENDER SERVICES OF
WISCONSIN, INC., Room 182
ATTENTION: *Doing Time Times*
517 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

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