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**ANTICIPATING BOP ISSUES AT SENTENCING  
AND REPRESENTING IMPRISONED CLIENTS**

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June 2005

The governmental instinct for over-incarceration requires diligent advocacy on our part to protect the rights of prisoners. A surprising array of potential litigation can substantially reduce the period of time our clients serve. Some issues should be addressed before sentencing; others arise after the prison door clangs shut.

The BOP's miscalculation of the federal good time statute by seven days for every year of the prison sentence under 18 U.S.C. § 3624(b), is perhaps the most wide-ranging issue. It affects 97% of all prisoners and costs 27,000 years of over-incarceration, an extra \$620 million that could be spent far more wisely. After a disappointing start, recent Supreme Court decisions and several courageous district court opinions have generated renewed optimism. Two issues – the unilateral termination of the boot camp program and the abrupt reversal of 30 years of halfway house placement policies – illustrate the BOP's disregard for our clients and have resulted in successful litigation. Four other issues -- the eligibility for the one-year sentence reduction for successful completion of residential substance abuse treatment under 18 U.S.C. § 3621(e); credit for time served while immigration defendants are in administrative custody under 18 U.S.C. § 3585(b); constitutional violations in prison disciplinary proceedings; and the Bureau of Prisons' tendency to ignore state concurrent sentences and administratively convert them into *de facto* consecutive sentences -- are also recurring areas of litigation.

**A. Miscalculation Of The Federal Good Time Statute By Seven Days For Every Year Of The Prison Sentence**

Until recently, most people assumed that prisoners receive 54 days for each year of their sentences under 18 U.S.C. § 3624(b), because that is what the statute says. Not so: the BOP only allows up to 47 days per year of the sentence imposed, which comes out to 12.8%. The BOP's interpretation ties good time credit to time actually served rather than the sentence imposed, resulting in over-incarceration at a rate of seven days for every year of the term of imprisonment.

For the last several years, the defense community, especially Families Against Mandatory Minimums, the National Association of Criminal Defense Lawyers, and the National Association of Federal Defenders, have been challenging the BOP's interpretation. Recently, the good time issue has been gaining momentum. Three district courts have applied traditional rules of statutory construction and found that the good time statute means what it says -- prisoners may earn up to 54 days good time credit for each year of the term of imprisonment, not for each year actually served under the BOP construction. *Moreland v. Federal Bureau of Prisons*, 363 F. Supp. 2d 882 (S.D. Tex 2005); *Williams v. Dewalt*, 351 F.Supp.2d 412 (D.Md. 2004); *White v. Scibana*, 314 F. Supp. 2d 834 (W.D.Wis. 2004), *reversed*, 390 F.3d 997 (7th Cir. 2004); *petition for cert. filed*, 73 U.S.L.W. ...674 (U.S. May 6, 2005) (No. 92-212). Unfortunately, several Circuits have generally followed the Ninth Circuit's lead in *Pacheco-Camacho v. Hood*, 272 F.3d 1266 (9th Cir. 2001), by finding "term of imprisonment" to be unambiguous in the statute's first two uses, but ambiguous in the third use, then according *Chevron* deference to the BOP's interpretation.

Fortunately, this Term's Supreme Court opinions in *Leocal v. Ashcroft*, 125 S. Ct. 377 (2004), and *Martinez v. Clark*, 125 S. Ct. 716 (2005), undermine the reasoning of the Circuit court decisions. These cases demonstrate that the canons of statutory construction -- including the rule of lenity -- apply before *Chevron* deference. The effect of *Leocal* and *Martinez* on the issue is evident in *Moreland*. In perhaps the most thoughtful and in depth analysis so far, the court rejected the BOP's interpretation, finding that it "plumbs new depths of linguistic confusion." The court applied the traditional rules of statutory construction -- including the rule of lenity -- to conclude that to "the extent there remained any ambiguity in the statute after considering its most natural linguistic meaning and legislative history, the rule of lenity eliminates all doubt: good conduct time must be based on the sentence imposed, rather than time served."

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The opportunity is wide open to once again challenge the BOP's interpretation. FAMM and the Federal Defender community have worked together to secure representation and provide whatever support is needed for the hundreds of *pro se* petitioners across the country. There are pending cases in at least the Second, Fourth, Fifth, Eighth and Ninth Circuits, as well as in district courts across the country.

A more thorough discussion of these recent developments and links to the relevant cases and pleadings can be found at <http://circuit9.blogspot.com/2005> in the Blog Summary. More information and sample pleadings, are also available on the NACDL website <<http://www.nacdl.org/goodtimecredit>> or you can contact Lynn Deffebach at the Federal Defender office in Portland, Oregon ([lynn\\_deffebach@fd.org](mailto:lynn_deffebach@fd.org)) or Mary Price at FAMM ([mprice@famm.org](mailto:mprice@famm.org)).

## **B. The Termination Of The Boot Camp Program**

The BOP announced on January 5, 2005, that the Intensive Confinement Center (ICC or boot camp) would be closing its doors for good when the last class finishes in June 2005. The unilateral termination of the program will deprive a significant benefit for many Federal Defender clients, not only reducing time of actual incarceration, but eliminating a positive rehabilitative program.

In 1990, Congress created the boot camp program, also known as the Shock Incarceration Program, codified at 18 U.S.C. § 4046. The Sentencing Commission promulgated U.S.S.G. § 5F1.7 the following year, giving sentencing judges discretion to recommend placement in boot camp. To qualify, the defendant must be serving a relatively short sentence for a non-violent offense and have no more than a minor criminal history. Under the BOP's regulations, qualified prisoners can receive up to six months of sentence reduction and extended home confinement after serving six months of the term of imprisonment in a regimented, military-style facility and a follow-up period in a halfway house.

Then, without any warning or notice, the BOP unilaterally announced -- in a memorandum to judges, prosecutors, and defenders -- that the program was being terminated. The BOP claimed that the program was not effective at reducing recidivism and was too expensive based on two studies of state boot camp programs conducted in the mid-1990's. Several prisoners filed motions for preliminary injunctions and requests to stay voluntary surrender dates. One such person was Richard Castellini, who received a 21-month sentence

with a judicial recommendation for boot camp placement. After the BOP announced termination of the program, he filed a civil action in Massachusetts requesting a preliminary injunction based on violation of the statute, violation of the notice-and-comment provisions of the Administrative Procedure Act, and violation of the *Ex Post Facto* Clause. *Castellini v. Lappin*, 365 F. Supp. 2d 197 (D. Mass. 2005). Judge Saris granted relief based on the latter two theories. For those whose offense conduct precedes compliance with the APA, relief is available. However, there are several layers of additional arguments that should foreclose termination of the program in the absence of Congressional action.

First, by analogy to line-item veto legislation, the agency action violates the separation of powers. In *Clinton v. City of New York*, 524 U.S. 417 (1998), the Court held that, once legislation is enacted, the Executive Branch is not entitled to repeal the law as promulgated by the Legislative Branch. The BOP does not have authority under Article I, Section 7, to, in effect, repeal the boot camp statute.

Second, the statute does not authorize termination of the program. The authorizing legislation referred to “the shock incarceration program *established* under the amendments made by this Act” (emphasis added). The BOP’s discretion is limited to determination of who is placed in the program and how it operates, but does not include express authority to end the program altogether. The *Castellini* court found that the statute permitted termination, based on *Lincoln v. Vigil*, 508 U.S. 182 (1993), a case involving allocation of Indian health care funds among several programs. This part of the opinion conflicts with the Supreme Court’s suggestion in a Bureau of Prisons case that, where agency action forecloses any exercise of discretion, the agency would “be making a nullity of the statute.” *Lopez v. Davis*, 531 U.S. 230, 243 n.4 (2001) (citing *INS v. Yueh-Shaio Yang*, 519 U.S. 26, 31 (1996)); see also *United States v. Miller*, 722 F.2d 562 (9th Cir. 1983) (“The existence of discretion requires its exercise”) (citing *Dorszynski v. United States*, 418 U.S. 424 (1974)). At the very least, the doctrine of constitutional avoidance would require the statute to be construed in a manner that did not create the separation of powers problem. *Clark v. Martinez*, 125 S. Ct. 716 (2005).

Third, even at the second prong of *Chevron* deference, the termination of the program is unreasonable. The agency claimed the boot camp program was ineffective and too expensive. The BOP cited studies that are irrelevant because they evaluate state programs that do not have the screening, incentives, and follow-up of the federal program. The BOP

also ignored studies demonstrating the federal program in fact saves money and results in slightly lower recidivism.

These arguments are elaborated in the memorandum in support of relief from the termination of boot camp in a case pending in the District of Oregon, available at <http://www.federaldefenders.org/docs/mandamusmem.pdf> or contact Lynn Deffebach at the Oregon Federal Public Defender office for documents and consultation.

### **C. Deprivation Of Community Corrections Placement Based On The Department Of Justice's Recent Misreading Of The BOP's Designation Discretion**

In February 2005, the BOP finalized its sudden reversal in December 2002 of two long-established policies on community corrections. Historically, the BOP routinely place Zone C offenders directly into community corrections for service of their terms of imprisonment if recommended by the sentencing judge, and allowed prisoners to spend up to 180 days of the remainder of their sentences in halfway houses regardless of the length of their sentences. The BOP's Office of Legal Counsel then claimed that the BOP did not have statutory authority to make such placements because community corrections was not the equivalent of "imprisonment" under the Sentencing Guidelines. Because the December 2002 policy shift was retroactively implemented, the BOP immediately began to transfer prisoners from direct commitments in halfway houses to institutions. The BOP also limited the pre-release community commitments provided under 18 U.S.C. § 3624(c) to the last 10% not to exceed six months. Thus, all prisoners sentenced to 60 months or less would receive less time in the community.

FPDs and other advocates filed for injunctions and habeas relief under Sections 2241 and 2255 based on a myriad of theories, including *ex post facto*, retroactivity, due process, the Administrative Procedure Act, and statutory construction. Numerous courts, displeased that their intended sentences were being thwarted, granted relief. *See Pinto v. Meniffee*, 2004 WL 3019760 (S.D.N.Y. Dec. 29, 2004) (collecting cases). The BOP's few appeals were mooted by the prisoners release before consideration of the merits. *See, e.g., Ashkenazi v. Attorney General of U.S.*, 346 F.3d 191(C.A.D.C. 2003).

After the first flurry of cases involving clients who were already in community corrections to serve their sentences pursuant to recommendations by the sentencing judge,

the focus of litigation shifted to the “back-end” -- prisoners given less halfway house time at the end of their sentences. Two Circuits, the First and Eighth, have come out with strong condemnations of the limitations. *Goldings v. Winn*, 383 F.3d 17 (1st Cir. 2004); *Elwood v. Jeter*, 386 F.3d 842, 846 (8th Cir. 2004). As held by both of these courts, Section 3624(c) only limits the affirmative obligation of the BOP to assure that a prisoner spends the last part of his sentence under pre-release conditions but does not limit the agency’s discretionary authority to place a prisoner in the community at any other time during the prisoner’s sentence. *Goldings*, 383 F.3d at 26; *Elwood*, 386 F.3d at 846-47.

The BOP eventually promulgated new regulations which became effective February 14, 2005. 70 Fed.Reg. 1659 (Jan. 10, 2005). The new rule backtracks from the initial rationale for the sudden policy reversal, acknowledging that it has the discretion to place inmates in community corrections for service of terms of imprisonment, but will categorically exercise that discretion to prohibit direct placements and end-of-term placement to 10%.

Despite the overwhelming judicial disapproval of the BOP’s policy, the BOP will not make direct commitments for Zone C offenders. In the pre-*Booker* era, Federal Defenders successfully argued for downward departures to achieve the desired result – a probationary sentence with a condition of halfway house placement. Fashioning appropriate sentences in the post-*Booker* world should be easier; the advisory sentence can be structured to achieve an equivalent result. As to the back-end placements, continued litigation as in *Goldings* and *Elwood* may provide relief. The APA argument may be weaker as to those whose offenses occurred after February 14, 2005, but that still leaves a great many clients who --based on the *Ex Post Facto* Clause and the doctrine against retroactivity -- can benefit from continued advocacy.

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

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

incarceration for prisoners “convicted of a nonviolent offense” who successfully completed the program. 18 U.S.C. § 3621(e)(2)(B).

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

Even though *Lopez* essentially closed the door on DAP eligibility challenges based on gun possession, we finally won on the APA issue left open in footnote 6 of *Lopez*. Judge Haggerty of the District of Oregon granted 57 habeas petitions, finding that the interim rule was invalid as to prisoners who had been disqualified during the period before the final rules were promulgated. *Bohner v. Daniels*, 243 F. Supp. 2d 1171 (D. Or. 2003). The BOP appeal of *Bohner* is pending but does not seriously dispute the APA violation. The same argument should prevail for gun possessors disqualified under the 1997 rule who would have been eligible under the Circuit split -- basically all Circuits except the Fourth and Fifth. Prisoners who are released to supervision before relief is granted can apply for early termination of supervised release under 18 U.S.C. § 3583(e). *Gunderson v. Hood*, 268 F.3d 11422, 1152 (9th Cir. 2001); *Bohner*, 243 F. Supp. 2d at 1174. As demonstrated by the CCC litigation, strict noncompliance with the APA in promulgating BOP rules can be a fruitful area of litigation.

In addition to the APA issue, we have had some success in litigating other DAP challenges: where rules are applied retroactively (*Bowen v. Hood*, 202 F.3d 1211, 1220-22 (9th Cir. 2002); *Cort v. Crabtree*, 113 F.3d 1081 (9th Cir. 1997)); where the BOP fails to follow its own rules (*Kuna v. Daniels*, 234 F. Supp. 2d 1168 (D.Or. 2002)); where the presentence report does not establish disqualifying facts, such as gun factors (*Hicks v. Hood*, 203 F. Supp. 2d 379 (D.Or. 2002)); and where a prior state assault conviction used to

disqualify DAP-ers does not meet the BOP's own definition for aggravated assault (*Byrd v. Crabtree*, 22 F. Supp. 2d 1128 (D.Or. 1998)).

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

An area where many clients lose small amounts of time is the BOP policy that excludes administrative immigration custody under the jail time statute, 18 U.S.C. § 3585(b). Across the country, the number of prosecutions for illegal reentry has skyrocketed, balancing the general decrease in other types of federal crimes. Depending on the manner in which these cases are brought into court, prisoners can lose days, weeks, or months, for which they receive no credit. BOP Program Statement 5880.28 (Feb. 14, 1997) ("An inmate being held by INS pending a civil deportation determination is not being held in 'official detention' pending criminal charges."). For example, immigration will sometimes take someone into custody while it "decides" whether to deport or prosecute. The dead-time problem results from the BOP's theory that any time spent in immigration custody prior to prosecution is exclusively related to civil deportation.

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

Another BOP policy that has significant impact on our 1326 clients is the failure of the BOP to aggregate certain consecutive (1325 six- and 24-month) sentences, resulting in significant loss of good time. The problem arises when the offense dates straddle April 26, 1996, the date the PLRA was enacted, which made minor changes in the good time scheme. These changes, according to the BOP, make it impossible for the sentences to be combined and treated as one. BOP Program Statement 5880.28 at 1-31 (Feb. 21, 1997). Because the six-month sentence is less than a year, the BOP treats it as a sentence to less than one year (which disqualifies it for good time under 18 U.S.C. § 3624(b)). This rule is flatly contrary to statute. Section 3584(c) states: "Multiple terms of imprisonment ordered to run

consecutively or concurrently shall be treated for administrative purposes as a single aggregate term of imprisonment.” This problem is sometimes negotiated by making the offense dates on the indictments and judgments post-April 1996. If litigation is needed, this issue should be a winner based on the abundant authority that statutes trump prison rules.

#### **F. Constitutional Violations In Prison Disciplinary Proceedings**

Where good time or other concrete collateral consequences are at issue, the district court has jurisdiction to review disciplinary proceedings in which there is an allegation that the prisoner’s statutory or constitutional rights were violated. For example, the district court found that a sanction for abuse of telephone privileges violated the due process rights of the prisoner because he had inadequate notice regarding the prohibition. *Hausen v. Van Buren*, 243 F. Supp. 2d 1, 165 (D. Or. 2002). More recently, we have been litigating the unconstitutional practice of imposing sanctions and transferring prisoners back to institutions following alleged halfway house violations. In one case, the halfway house disciplinary hearing concluded that the prisoner had committed no violation and recommended expunction of the incident report. Despite this finding, the prisoner, without notice or hearing, was sanctioned by a Disciplinary Hearings Officer with transfer back to the institution and loss of his DAP early release based on additional evidence gathered by the DHO. The court granted our preliminary injunction, and hopefully, will modify the practice. But, listen to your clients when they call. Prison disciplinary actions, perhaps because they are so seldom reviewed, are often fraught with due process problems that need a lawyer’s skill to identify and to articulate the bases for successful court challenges.

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

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

agreement of the parties. If the case goes to litigation, there is still hope for a decent resolution.

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

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

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

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

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

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

Once competing judgments are final, and after the time for collateral state proceedings has passed, it is difficult, but not impossible, to repair concurrent/consecutive problems through litigation. In *Cozine v. Crabtree*, 15 F. Supp. 2d 997 (D.Or. 1998), the court held that the BOP was required to credit a federal sentence with custodial time served by a prisoner in a state facility under a state sentence imposed after and expressly concurrent with the federal sentence, and where the state tendered the prisoner to the BOP, which refused to accept custody. First, the court rejected the Bureau of Prisons’ argument that, because the federal sentence was not explicitly concurrent to the subsequently imposed state sentence, the federal sentence was consecutive by operation of 18 U.S.C. § 3584(a). The court pointed out that, because the state sentence had not yet been imposed, there was no sentence to which the federal sentence could run concurrently. *Cozine*, 15 F. Supp. 2d at 1006-07. Second, *Cozine* held that the doctrine of comity required the Bureau of Prisons to effectuate the sentence the state imposed, even if to do so meant that the prisoner received “double credit.” 15 F. Supp. 2d at 1011. *But see Taylor v. Sawyer*, 284 F.3d 1143 (9th Cir. 2002). Finally, the court held that, because Mr. Cozine was in the federal government’s primary jurisdiction when the federal sentence was imposed, the state institution should be designated *nunc pro tunc* for service of the federal sentence. 15 F. Supp. 2d at 1018.

In *Buggs v. Crabtree*, 32 F. Supp. 2d 1215 (D.Or. 1998), the district court also gave effect to a state concurrent sentence, notwithstanding contrary BOP rules. The issue in *Buggs* turned on who had primary jurisdiction. There, the state prosecutor, defense counsel, and the judge all believed Mr. Buggs was serving his federal sentence when the state court sentenced him, ordering the sentence to run concurrently to the federal sentence “presently

being served.” However, the BOP did not take custody of Mr. Buggs until after he had completed the state sentence, then refused to credit him with any prior custody time. The *Buggs* court held that, by the state’s failure to act for over six months on the state charges, the state relinquished its primary jurisdiction to the federal government. 32 F. Supp. 2d at 1219. Thus, Mr. Buggs was in the federal government’s primary jurisdiction when he was sentenced. As such, his sentence began to run upon sentencing, and he was entitled to credit for time spent in the state jail. 32 F. Supp. 2d at 1232. The court also found that comity and full faith and credit required the Bureau of Prisons to credit with all prior custody even if that time was credited toward another sentence. *Id.*

Another issue regarding concurrent time arises under the section of the jail credit statute, 18 U.S.C. § 3585(b), that provides for credit for any time spent in official detention “that has not been credited against another sentence.” Although generally barring credit previously provided against state sentences, there is an exception where a federal detainer prevented release on bail of the prisoner while in state custody. *Shaw v. Smith*, 680 F.2d 1104, 1106 (5th Cir. 1982). However, under the statutes, credit is generally not awarded from the start of the state sentence to the start of the federal sentence, nor does the federal sentence commence any earlier than imposition. Again, the best solutions involve prevention, such as structuring the federal sentence to be reduced by the time in state custody before the federal sentence starts under Application Note 2 of U.S.S.G. § 5G1.3.

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

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

that practice since “the existence of discretion requires its exercise.” *See United States v. Miller*, 722 F.2d 562, 565 (9th Cir. 1983).

The requirement that administrative remedies must be exhausted raises several tactical and legal issues. First, exhaustion is not a jurisdictional requirement under Section 2241, but a waivable judicial requirement. *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992); *Brown v. Rison* 895 F.2d 533, 535 (9th Cir. 1990); *United States v. Woods*, 888 F.2d 653, 654 (9th Cir. 1989). The Bureau of Prisons often argues incorrectly that the Prison Litigation Reform Act exhaustion requirement applies to Section 2241 -- it does not. *Casanova v. Dubois*, 304 F.3d 75, 78 n.3 (1st Cir. 2002) (citing cases); *Skinner v. Wiley*, 355 F.3d 1293 (11th Cir. 2004); *Grier v. Hood*, 46 Fed.Appx. 433, 440 (9th Cir. 2002); *on remand, Bohner v. Daniels*, 243 F. Supp. 2d 1171 (D. Or. 2003). Where there is no immediate prejudice to the prisoner, we generally recommend that prisoners exhaust their administrative remedies up to the national office before filing a Section 2241 petition for two reasons: 1) by some chance, the client might prevail; and 2) the BOP will be deprived of a procedural argument to obfuscate your issue. In the situation where your client is facing irreparable harm and futility, we have sample briefing on waiver of exhaustion of administrative remedies.

There are other vehicles available for challenging the BOP’s policies. The former general rule that habeas is only available to challenge the length of confinement, while challenges to conditions of confinement cases must be brought through civil actions, is not inflexible. This Term, the Supreme Court held that state prisoners challenging parole board procedures that, if successful, would inevitably result in a shorter sentence, could seek §1983 or equitable relief. *Wilkerson v. Dotson*, 125 S. Ct. 1242 (2005); *see also Docken v. Chase*, 393 F.3d 1024, 1030 (9th Cir.2004).

Courts are also empowered to grant injunctive and declaratory relief under the APA, the Mandamus Act, and the Declaratory Judgment Act. Under the APA, the court may enter a judgment or device against the United States provided that “any mandatory or injunctive decree shall specify the Federal officer . . . personally responsible for compliance.” 5 U.S.C. § 702. Under Section 706, the court may order the BOP to fulfill its statutory duty to administer a program, or enjoin it from acting beyond its statutory authority, or if its actions are arbitrary and capricious. *Castellini*, 365 F. Supp. 2d at 206 (finding court intervention appropriate). Similarly, under 28 U.S.C. § 1361, the court may compel the BOP to perform its duty to administer a program. Additionally, the Declaratory Judgment Act provides broad authority to fashion an appropriate remedy: “Further necessary or proper relief based on a

declaratory judgment or decree may be granted.” 28 U.S.C. § 2202; *see also Colton v. Ashcroft*, 299 F. Supp. 2d 681 (E.D. Ky. 2004) (granting declaratory and injunctive relief against the BOP’s cancellation of halfway house program).

The potential of raising non-habeas actions possibly will avoid the limitations on § 2241 jurisdiction that requires the petition to be brought only in the district of incarceration. A writ of mandamus was filed in the boot camp case mentioned earlier.

## **I. Designation And Red-Flag Issues In The Presentence Investigation Report**

Your client’s presentence report is the key document that follows him or her throughout a term of imprisonment and forms the core of the Bureau of Prisons’ file on that client. From the very beginning, it is used by the BOP for all sorts of programming and classification decisions, including the client’s initial designation. It is important that in reviewing the PSR prior to sentencing, we be alert not only to issues which may affect sentencing (particularly guideline issues) but also to facts which may affect the client after sentencing. These suggestions come from federal appellate practitioner and expert BOP advocate Peter Goldberger, Attorney at Law, Ardmore, Pennsylvania.

- A. Designation.** A client’s initial designation is determined by his or her score on Form BP-337, with potential overrides due to “Public Safety Factors” (PSF). The scoring is described in detail in Chapter 5 (for males) or Chapter 6 (for females) of BOP Program Statement 5100.07, the Security Designation and Custody Classification Manual (9/3/1999 ed., with 2/17/2000 and 1/31/2002 updates) (170-page PDF document available under [www.bop.gov](http://www.bop.gov)). PSFs are discussed in Chapter 7, as are “management variables” that can justify an override of the results of the scoring in a particular case.

For example, a score of 15 or more points (out of a possible worst-case 27) presumptively indicates a High Security (penitentiary) prison designation for a male inmate. The key questions are: (a) existence and type of detainer(s) (rated by severity, from 0 for none or INS/BICE [but see deportable alien PSF “H”], to 7 for a detainer based on a “greatest severity” offense, as classified in Appx. B); (b) severity of current offense (score 0-7 according to Appx. B); (c) months to release (females only and (ironically) using 85% to discount for good conduct time) (for males, note PSF for more than 10 years to serve); (d) type of prior commitments (score 0-3, depending on seriousness under Appx. B of most

serious prior); (e) history of escapes or escape attempts (score 0-3, and note “serious escape” PSF); (f) history of violence (score 0-7 based on seriousness and years ago -- only convictions count, current offense does not); (g) precommitment status (minus 3 for release before conviction and another minus 3 for voluntary surrender after sentencing, unless “any indication” of bail violation). The point total suggests the level of institution to be assigned (minimum, low, medium, high, maximum, or administrative), subject to overrides due to PSFs.

A “PSF” suggests that special security considerations apply. The PSFs (which are described in Chapter 7 of P.S. 5100.07) are:

- (B) “disruptive group” under the Central Inmate Monitoring System (CIMS, *see* P.S. 5180.04) (males only) - thus counsel should check that any gang or organized crime affiliation given in the PSR is substantiated, especially if group is listed in CIMS - requires High security, unless waived;

- (C) “greatest severity offense” (*see* Appx. B) (males only) - if offense of conviction is not listed, but might be analogized to a listed offense, ask sentencing court for a finding that offense is not analogous;

- (F) “sex offender” - any current or past history (convictions not necessary) of “aggressive or abusive” sexual conduct; if the PSR indicates questionable or borderline behavior, seek a finding it was not “aggressive or abusive”;

- (G) under CIMS due to threat to government official;

- (H) “deportable alien” - inapplicable if three years stable or regular (year round, full time) employment, five years United States domicile immediately prior, and verified strong U.S. family ties; if exception applies, counsel should ensure these factors are clear in the PSR;

- (I) sentence length (males only) - more than 10 years remaining requires Low, more than 20 requires at least Medium, more than 30 (or life) requires High, all unless waived;

- (K) violent behavior (females only) - two convictions or findings for serious violence within last five years, requires assignment to Carswell Admin Unit, unless waived;

●(L) serious escape - within last ten years, females required to go to Carswell Admin Unit, unless waived; males must to go to at least Medium, unless waived;

●(M) prison disturbance - requires High for males, Carswell Admin Unit for females;

●(N) juvenile violence - applies only to juvenile inmates, if there is history of even one serious violent conviction;

●(O) “serious telephone abuse” - according to PSR, inmate used or attempted to use a telephone to “further criminal activities or promote illicit organizations,” **but only if:** (i) “leader/organizer” or “primary motivator” per Appx. G; **or** (ii) used phone to communicate threats of death or bodily injury; **or** (iii) used phone to conduct or attempt significant fraudulent activity while incarcerated; **or** (iv) leader/organizer of significant fraudulent activity in the community; **or** (v) used phone to arrange introduction of drugs while incarcerated. Also applies if monitoring of inmate calls is “need[ed]” in response to “significant concern” communicated by federal law enforcement or U.S. Attorney’s Office, if inmate has telephone disciplinary violation, or BOP “has reasonable suspicion and/or documented intelligence supporting telephone abuse.” In addition to affecting custody, this PSF may cause reduction in standard 300 minute telephone allowance.

Assignment of “public safety factors” (C), (F), (G), (H), (I), or (O) will keep an inmate out of minimum security, and thus out of a camp designation and furlough eligibility, unless waived by the Regional Director.

**B. Red Flags in the PSR.** When reviewing a PSR, try to be alert to potential “red flags” that may not affect the guideline rating but can have a beneficial or adverse effect while your client is incarcerated, including DAP eligibility and boot camp. This admonition applies to all facts which may give rise to a PSF, as well as the facts which will give rise to the security designation score. Seek corrections or clarifications whenever possible, particularly if the PSR mentions it because a co-defendant engaged in the behavior but your client was not involved. These include: suggestions of past sexual misconduct, gang affiliation, violence, use of a telephone for criminal purposes, threats or retaliation against witnesses, gun possession, drug or alcohol abuse (may help get RDAP placement). Relationships to persons who may want to visit should

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be clear. Address of residence should reflect, if at all possible, the place to which the client will want to return for supervision after imprisonment.

## **Conclusion**

Prison litigation should be just as much a part of representation as pretrial motions and sentencing. The time is real, and the prisoner is vulnerable. Without the assistance of a trained advocate, the chances of successful litigation of prisoners' rights drop precipitously. The Portland Defender office has an excellent paralegal helping on prisoner cases, Lynn Deffebach. She is available for consultation and model pleadings at [lynn\\_deffebach@fd.org](mailto:lynn_deffebach@fd.org).