

Over-Incarceration And The Bureau Of Prisons: Ten Points For Change

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1. Good Time Fix

- The BOP interprets good time credits of “up to 54 days at the end of each year of the prisoner’s term of imprisonment” in 18 U.S.C. § 3624(b) to mean 47 days for every year of the term of imprisonment.
- The Sentencing Commission used 54 days for every year imposed – or 15% – in constructing the Sentencing Table.
- Then-Senator Biden described good time credits as “up to 1.5 years in good time credits” on a ten-year sentence, even though BOP provides only 12.2% in good time credits, but the Supreme Court has upheld the BOP’s interpretation in *Barber*.
- DOJ and BOP support the Good Time Fix, which Senator Leahy described as “the first and easiest thing” Congress can do to address over-incarceration.
- The Good Time Fix would save approximately \$1 billion after the first year and, conservatively, about \$40 million per year thereafter, reducing the overall federal prison population by about 2%.

2. Residential Drug Abuse Program – Sentencing

- Up to one year sentence reduction is available for non-violent offenders under 18 U.S.C. § 3621(e).
- Limitation for prior convictions now has a time limit of “ten years prior to the date of sentencing for their current commitment (28 C.F.R. § 550.55(b)(4)).
- Document substance abuse and possible judicial recommendation.
- No lengthening sentences to accommodate RDAP under *Tapia v. United States*, 564 U.S. 319, 131 S. Ct. 2382 (2011).

3. Detainer Litigation For Participation In RDAP

- 1995: Participation and sentence reduction available for all “eligible prisoners” – defined in 18 U.S.C. § 3621(e)(5)(B) as (1) determined to have a substance abuse problem, and (2) willing to participate in in-person residential program
- 1996: No sentence reduction available if not eligible for community corrections by administrative rule
- 2009: No participation available if not eligible for community corrections by administrative rule
- BOP may be violating the statute and the Administrative Procedure Act on *participation* under § 3621(e)(1)(C) because the BOP “shall” provide residential substance abuse treatment “for all eligible prisoners”
- The BOP may be violating the APA on *sentence reduction* based on the American Psychiatric Association recantation of its comment

4. Federal Boot Camp Analog – Sentencing

- Congress and the Commission okayed the program for non-violent offenders: 30 month sentence could be served by six months boot camp, six month sentence reduction, the rest of time in community corrections.
- The BOP abolished the program in 2004.
- For non-violent defendants at 30 months, try to structure six months in custody plus six months in a halfway house, the rest on supervised release with community service.
- Congress and the Commission have already found that the boot camp structure is sufficient but not greater than necessary punishment for qualifying defendants.

5. Good Time Credits On Concurrent Time – Sentencing

- Because BOP gives no credit for pretrial time credited to another sentence under 18 U.S.C. § 3585 (b), concurrency can be achieved by an adjustment under U.S.S.G. § 5G1.3(b) or departure under § 5G1.3(c) or § 5K2.23.
- The BOP provides no good time credit against the adjusted time, as held in *Schleining v. Thomas*, 642 F.3d 1242 (9th Cir. 2011).
- But in litigation, BOP conceded variance for good time credits is appropriate.
- Good time variance or departure can mean months for individuals and millions in taxpayer savings systemically.

“A defendant whose federal sentencing has been long delayed may seek a variance based on the lost opportunity for good conduct time credit, which the sentencing court has the discretion to grant.”

Brief of Respondent, *Schleining v. Thomas*, 642 F.3d 1242 (9th Cir. 2011) (No. 10-35792), 2011 WL 991513, *30.

“A defendant may request a variance based on good behavior while serving a state sentence for related criminal conduct, a mechanism consistent with the statutory goal of making good conduct time retrospective rather than prospective.”

Brief of Respondent, *Lopez v. Terrell*, 654 F.3d 176 (2d Cir. 2011) (No.10-2079), 2011 WL 680803, *8 .

6. Concurrent And Consecutive Sentencing And Criminal Bankruptcy

- State and federal concurrent and consecutive sentencing is the most often botched area of sentencing.
- Understand primary custody, coordinate with state actors, and use analogy to commercial liens.
- After *Setser*, federal judge has discretion to rule on yet-to-be-imposed state sentences.
- Judges can make designation recommendations at any time under 18 U.S.C. § 3621(b)(4), including nunc pro tunc to achieve concurrency under BOP program statements (*United States v. Cobellos*, 671 F.3d 852, 855 n.2 (9th Cir. 2011)).

7. Concurrent And Consecutive – Litigation

- The concurrent or consecutive decision is judicial, not executive, *Setser v. United States*, 132 S. Ct. 1463 (2012).
- *Setser* states that the federal court can forbear and not take a position on future sentences.
- The BOP still exercises discretion through nunc pro tunc designations where the federal prisoners were in primary state jurisdiction with no federal decision on concurrency and state judgments purporting to order concurrent time.
- Stephen R. Sady, *State Sovereignty and Federal Sentencing: Why de facto Consecutive Sentencing by the Bureau of Prisons Should Not Survive* Bond v. United States, Federal Sentencing Reporter, Volume 27, Number I (October 2014).

8. Avoid Immigration Dead Time

- Immigration defendants are sometimes held in administrative custody for weeks before the federal prosecution is arranged with credit required for time in “official detention.”
- Under Program Statement 5880.28, 1-15A (Feb. 14, 1997), “Official detention does not include time spent in custody of the Immigration and Naturalization Service.”
- Reduce sentence by those days by analogy to § 5G1.3 or § 5K2.23;

or

Follow the District practice and incorporate the time into plea offers;

or

Litigate for violation of the requirement in 18 U.S.C. § 3585(b) of “credit for any time he has spent in official detention” prior to commencement of the sentence as held in *Zavala v. Ives*, 785 F.3d 367 (9th Cir. 2015).

9. Second Look Resentencing Under 18 U.S.C. § 3582(c)

- What happens when, after sentencing, a prisoner has a terminal illness, physical impairment, or family tragedy?
- Upon a motion from the BOP, the court can reduce the sentence for “extraordinary and compelling” reasons under § 3582(c)(1)(A)(i).
- The era of the “death rattle rule” ended August 12, 2013, with Program Statement 5050.49:
 - *Medical circumstances for motions to reduce are expanded to 18 months life expectancy;
 - *Elderly patients 65 or older who have served half their sentence are eligible;
 - *The reasons for filing can include non-medical grounds such as for death or incapacitation of a family member caregiver.
- Litigation issues remain regarding initiation of motion and Sentencing Commission standards.

10. Prisoners Need Representation

- Courts have discretion to appoint counsel for litigation under 18 U.S.C. § 3006A(a)(2)(B)
- Days, months, and years are at stake in complex areas of law
- Cases can be negotiated where a representative can assist
- Super-deference to the BOP and mistakes cumulatively cost millions of dollars and add to over-incarceration
- Pro se representation is incompetent and skews the development of the law
- Lawyer can put equitable claims into the language of the law