



Issue No. 6

The
Doing Time

Times

Winter 2006

Federal Defender Services
of Wisconsin, Inc.

OUT FRONT

It's been one year since the Supreme Court issued the *Booker/Fanfan* decisions, altering the sentencing landscape in federal court. Three contributors to this issue of the *Doing Time Times* give their perspectives on post-*Booker* developments. Freddie Booker's lead counsel, Christopher Kelly, ("*Booker* Winners and Losers" at Page 4) notes that the change from mandatory to advisory sentencing guidelines has yet to achieve "individualized sentences" for many defendants. Professor Douglas Berman, a national sentencing policy expert, ("*Booker's* Impact, Victims, and Vices" at Page 5) observes that a "culture of guidelines compliance" continues to persist such that sentencing outcomes are "largely unchanged." Professor Berman,

however, does see important changes from those courts that are effectively evaluating, not just the guidelines range, but all "statutorily prescribed factors" at sentencing. Appellate Defender Frances Pratt ("*Booker* and Appellate Review of Sentences" at Page 9) describes how some appeals courts are now restricting appellate review, finding that guidelines-compliant sentences are presumptively reasonable.

Will *Booker's* impact on sentencing also affect guilty plea rates? (This Issue's "By the Numbers" column (at Page 3) puts the 2003 rate at 96% (72,589 out of 75,805 convicted defendants)). Early post-*Booker* predictions from the Justice Department theorized that an advisory guideline system would reduce incentives for defendants to

plead guilty and that trial rates would increase significantly. Defendants, they thought, might obtain the same or even more favorable outcomes without plea agreements.

Justice Souter raised this idea in *Booker*; he worried that uncertainty resulting from the shift to advisory guidelines would “infect the entire universe of guilty pleas, [reducing] the certainty of expectations in the plea process.” Law professor Ronald Wright writes in a recent article that because the guidelines are no longer mandatory, plea discounts that prosecutors offer to defendants carry less certainty than before. “To the extent the plea discount is large and certain, guilty pleas will follow; when the plea discount is small and uncertain, more trials will occur.”

As more questions stemming from *Booker* reach resolution, it will be important to revisit these predictions of sentencing uncertainty under the advisory guidelines.

Booker's effects, if any, on guilty plea rates should then be a new topic for discussion in future Issues of the *Doing Time Times*.

Jim Walrath
Federal Defender
of Wisconsin

AT A GLANCE

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FEDERAL INMATES AND CASES

The U.S. Bureau of Justice Statistics reported the following data available at www.ojp.usdoj.gov/bjs/, for the most recent available year, 2003:

Types of Cases and Sentencing

- During 2003, criminal cases were commenced against 92,085 defendants in U.S. district courts. Most (87%) were charged with a felony offense. Thirty-eight percent of felony defendants were charged with a drug offense; 33% of all defendants were charged with a public-order offense -- including 17% with an immigration offense and 11% with a weapons offense. Seventeen percent were charged with a property offense.

- For the most recent available year, 2003, cases were terminated against 85,106 defendants. Most (89%) defendants were convicted. Of the 75,805 defendants convicted, 72,589 (or 96%) pleaded guilty or no-contest.

- Of the 75,805 defendants convicted and sentenced during 2003, 76%

were sentenced to a term of incarceration (either alone or in conjunction with probation), 16% were sentenced to probation (either alone or with incarceration), and 4% were sentenced to pay a fine alone.

- The average prison sentence imposed during 2003 was 59 months. Defendants convicted of violent felonies (97 months), weapons felonies (84 months), and drug felonies (81 months) received the longest prison terms, on average.

Federal Prison Population

- During 2003, the Federal Bureau of Prisons received 53,562 inmates from U.S. district courts; an additional 19,113 inmates were received from other sources such as supervision violations; 63,732 inmates were released. As of September 30, 2003, 152,459 sentenced offenders were under the jurisdiction of the Federal Bureau of Prisons.

- Offenders entering federal prison during 2003 could expect to serve about 88% of the sentence imposed compared to 65% for those who entered during 1990.

BOOKER WINNERS AND LOSERS

T. Christopher Kelly, Counsel of Record in United States v. Booker

My co-counsel, Dean Strang, analyzes *Booker* in terms of “*Booker* winners” and “*Booker* losers.” *Booker* winners are sentenced by judges who use their *Booker*-bestowed discretion to impose more reasonable sentences than the Guidelines suggest. *Booker* losers are sentenced by judges who impose harsher sentences than the Guidelines suggest.

By this definition, Freddie Booker was neither a *Booker* winner nor a *Booker* loser. He appealed from a 30 year sentence. At the end of his journey to the Supreme Court, he was re-sentenced to 30 years. It is small comfort to Freddie Booker, a man in his 50's, that his case significantly changed the landscape of federal sentencing; he's still almost certain to die in prison. If Freddie Booker can find any solace in such a disappointing experience, it will come from the *Booker* winners he will meet as the years go by. Our job is to produce more *Booker* winners.

The Supreme Court gave judges the freedom to be fair, but old sentencing habits die hard. Nonetheless, business as usual (which is what I have generally encountered in the aftermath of *Booker*) is not what the Supreme Court commanded. When judges routinely impose

individualized sentences that balance all relevant factors, - when they no longer feel compelled to give controlling weight to just one factor, the applicable guideline range- the potential of the *Booker* decision will be realized. We must continue to push judges to take the lesson of *Booker* seriously; the guidelines are but one factor to balance against many others in fashioning a sentence that is not “greater than necessary” to meet the goals of sentencing.

BOOKER 'S IMPACT, VIRTUES AND VICES

Douglas A. Berman

*William B. Saxbe Designated Professor of Law
Moritz College of Law at The Ohio State
University*

Because judicial complaints about the rigidity, complexity, and harshness of the federal Sentencing Guidelines were legion before *Booker*, one might have expected a radical transformation of federal sentencing after the Supreme Court declared the Guidelines advisory. Based on a year of experience with the *Booker* remedy, however, it now appears that Justice Breyer largely succeeded in preserving the fundamental pre-*Booker* features of federal sentencing. Despite changing the federal sentencing Guidelines from mandates to advice, the *Booker* decision does not appear to have radically transformed either basic

practices or typical outcomes in the federal sentencing system.

Since the first weeks after *Booker*, district courts have been engaged in a dynamic debate over the precise weight to be given the Guidelines now that they are only advisory. But this debate probably should be considered more a matter of style than substance, because there is universal lower court agreement that, after *Booker*, district judges must still properly calculate Guideline sentencing ranges in the course of selecting a sentence and must still provide a reasoned justification for any decision to deviate from the Guidelines. Moreover, beyond the work of district courts, the activities of other players in the federal sentencing system have not changed radically: probation officers are still preparing presentence reports relying on the same sources of information as before *Booker*; prosecutors and defendants are still dickering over Guideline application issues in plea negotiations and before sentencing courts; district courts are still relying on uncharged conduct in calculating the now advisory sentencing ranges; and appellate courts are still primarily concerned with whether Guideline ranges have been properly calculated.

Indeed, a year after *Booker*, numerous district and circuit court opinions and cumulative post-*Booker* data suggest

that the legal and political culture has made the federal sentencing system almost impervious to dramatic change. *Booker's* muted impact on federal sentencing practices and outcomes highlights that pre-*Booker* legal culture acclimated case-level sentencing decision-makers – judges, prosecutors, defense attorneys, probation officers – to a rule-bound sentencing process that, through judicial fact-finding, resulted in long sentences for most federal offenders. And the pre-*Booker* political culture was marked by systemwide sentencing decision-makers – Congress, the U.S. Sentencing Commission, the Department of Justice – becoming astute at enforcing compliance with a rule-bound sentencing process. Consequently, a full year after *Booker*, we can observe (1) a federal sentencing process that still remains exceedingly focused on Guideline calculations based on judicial fact-finding, and (2) federal sentencing outcomes in which most sentences are still imposed within the (now advisory) Guideline ranges and most offenders are still receiving significant terms of imprisonment. In short, a culture of Guideline compliance has persisted after *Booker*. Indeed, as applied by the lower courts, the *Booker* decision appears to have only slightly mitigated the rigidity of the federal

sentencing system, and the decision has perhaps aggravated the system's complexity and preserved its basic harshness. These realities are borne out by a review of the post-*Booker* caselaw and also the data on post-*Booker* sentencing outcomes that have been released by the U.S. Sentencing Commission. In the words of Sentencing Commission Chair Judge Ricardo Hinojosa, the "sentencing trends for the post-*Booker* data have remained relatively stable." The Sentencing Commission's post-*Booker* data reveal a noticeable decline in the national average of "within range" guideline sentences, but this data also shows that average and median sentences in nearly all categories of crimes are virtually unchanged from recent years. The data thus suggests that, while the route to particular sentences might be a bit different after *Booker*, the bottom line in terms of sentencing outcomes appears to be largely unchanged.

And yet, though there clearly has not been a dramatic shift in federal sentencing practices or outcomes in *Booker's* wake, observers must recognize and acknowledge that, at least in some courtrooms and for some cases, *Booker* has had a tangible and consequential effect on federal sentencing. This reality is evidenced most clearly through the numerous written sentencing opinions by certain district judges which have

stressed that *Booker* calls for, at the very least in particular cases and settings, a shift in a judge's approach to and attitudes about following the guidelines. A focus on these decisions suggests that sentencing after *Booker* now reflects what one recent report has called "a new methodology of judicial deliberation." By engaging in a form of "rational jurisprudence and thoughtful statutory interpretation," at least some sentencing judges are relying on their new post-*Booker* authority to more effectively "evaluate all statutorily prescribed factors" at sentencing.

Though these written decisions may not provide a fully representative sample of post-*Booker* work in the sentencing courts, they do suggest that *Booker* has at least prompted an important change in sentencing philosophy in the decision-making of some sentencing courts. Indeed, these decisions, along with anecdotal reports and reflections from persons involved in day-to-day federal sentencing proceedings, spotlight what might be viewed as the primary positive potential consequences of the *Booker* remedy. These would seem to include: an improved balance between the application of firm sentencing rules and judicial discretion; an improved balance between judicial and prosecutorial power; improved

opportunities for district judges to exercise reasoned sentencing judgment to tailor sentences to individual case circumstances; and a sensible (though perhaps very slight) reordering of sentencing outcomes in which those most deserving of reduced (or increased) sentences are getting the benefits (or detriments) of expanded judicial authority to sentence outside the Guidelines. In short, to the extent that it appears that *Booker* has changed federal sentencing at all, it appears that the changes *Booker* has brought have been mostly for the better.

But, of course, *Booker's* apparently small, but perhaps still consequential, changes to federal sentencing have not received praise from all quarters. In testimony presented at a hearing of a subcommittee of the House of Representatives right after the *Booker* decision, Assistant Attorney General Christopher Wray suggested that there would be a "need for legislative action" in response to *Booker*. Wray's testimony identified "vulnerabilities that are inherent in advisory guidelines," and he emphasized concerns about the potential for greater sentencing disparity in the wake of *Booker*. Wray also spotlighted a distinct and important concern for the Justice Department, namely that an advisory guideline system might result in "reduced incentive for defendants to enter early

plea agreements or cooperation agreements with the government.” Similarly, in a major policy speech delivered to a conference of the National Center for Victims of Crime in June 2005, Attorney General Alberto Gonzales discussed the impact of *Booker* on federal sentencing and asserted that the “advisory guidelines system we currently have can and must be improved.” In his speech, Gonzales provided anecdotal accounts of problems created by *Booker*, and he claimed that, since *Booker*, there has been “an increased disparity in sentences, and a drift toward lesser sentences.”

The concerns expressed by the Department of Justice are to some extent borne out by post-*Booker* sentencing data and the post-*Booker* caselaw, especially as concerns the risk of significant disparity in sentencing procedures and outcomes in the wake of *Booker*. Circuit-by-circuit and district-by-district data, as well as anecdotal reports and published opinions, reveal that the impact of greater judicial discretion has clearly been spread unevenly in courtrooms across the country and show some significant judge-to-judge differences in the resolution of various important post-*Booker* legal and practical issues.

The defense bar also has its own gripes about the post-*Booker* world, although most of these center around the fact that *Booker* has thus far failed to have a widespread impact on district courts’ sentencing practices or ultimate sentencing decisions and that some courts are adhering to the guidelines as a matter of course. In addition, stressing that Guideline ranges still have “a definite and measurable effect on the loss of liberty,” the defense bar has lamented the fact that some of the procedural rights and principles championed in *Blakely* and in the merits portion of the *Booker* ruling have been undermined by the continued use of lax sentencing procedures in the application of the now advisory Guidelines.

And, not to be overlooked, in the wake of *Booker*, all federal sentencing participants - judges, prosecutors, defense attorneys, probation officers – necessarily confront enduring uncertainty about lawful and appropriate sentencing rules and procedures and outcomes. Though answering the most basic questions about the Guidelines’ status as a result of its *Blakely* ruling, the *Booker* court raised more questions than it answered concerning the day-to-day particulars of operating an advisory sentencing guideline system. Consequently, the only legal certainty in the period after *Booker* has been,

and will continue to be, that lots and lots of lower-court litigation is necessary to work out the inevitable and challenging kinks of completely transforming a mandatory sentencing system into an advisory one.

BOOKER AND APPELLATE REVIEW OF SENTENCES

Frances H. Pratt

Appellate Attorney, Office of the Federal Public Defender, Alexandria, Virginia

As Doug Berman astutely points out at the end of his commentary, *supra*, the Supreme Court's decision in *Booker* raised more questions that it answered by making the Sentencing Guidelines advisory. This is true not only at the district court level – for example, in regard to issues such as the weight to be given the Guidelines in considering the various factors listed in 18 U.S.C. § 3553(a) or the appropriate standard of proof for upward adjustments that result in enormous increases in a guideline range – but also at the appellate court level. While recognizing that many defendants waive their appeal rights (although pleading straight up may be a more attractive option after *Booker*), this commentary attempts to suggest some of the issues raised by the change in standard of review for those who do pursue appeals of their sentences.

Booker, almost as an afterthought, concluded that the excision of 18 U.S.C. § 3742(e) (which had spelled out standard of review for sentences imposed under the Guidelines when mandatory) left “reasonableness” as the appropriate standard of review. See *United States v. Booker*, 125 U.S. 738, 765-67 (2005). The first question, then, is what is “reasonable”? Or, viewed in the opposite way, what is “reasonableness” not?

What it is not is a standard for the district courts to apply in sentencing. This is because reasonableness is a standard of review for the appellate courts, not a substantive rule of decision-making for the district court in the first instance. Section 3553(a) does not direct a court to impose a “reasonable” sentence; rather, the statute directs a court to impose a sentence that is “sufficient but not greater than necessary.” The two standards are not the same, nor are they interchangeable. Indeed, they serve entirely different functions. Although in a particular case there may be more than one sentence that might be considered “reasonable” in the ordinary sense of that word – that is, “[f]air, proper, just, moderate, [and] suitable under the circumstances”¹ – all such potential

¹See, e.g., Black's Law Dictionary 1265 (6th ed. 1990)

sentences are still subject to the substantive rule of limitation expressed in § 3553(a). That is, the statute provides an upper limit or a “cap,” above which a district court is prohibited from sentencing a defendant, no matter what the guideline range is. It is up to defense counsel to ensure that the district courts not only adhere to that standard, but apply it in the first instance.

Returning to the original question, what is “reasonableness,” although the Supreme Court did not fully explain how the standard would apply in reviewing appellate challenges to sentences, it did provide at least two clues. First, the Court observed that “Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable.” 125 S. Ct. at 765-66.

This observation indicates that review for reasonableness must be in reference to *all* of the applicable factors referenced in 18 U.S.C. § 3553(a), not just the Guidelines. It

(defining “reasonable” as “[f]air, proper, just, moderate, suitable under the circumstances”).

may also suggest that at some level, an appellate court should (or perhaps even must) conduct its own analysis of the facts of a particular case and not simply defer in a wholesale fashion to a district court’s determination. That is, under reasonableness review, an appellate court may be called upon to conduct some sort of proportionality review.

This will be particularly important in a case in which a sentence is not only extremely high vis-a-vis that case but is also extremely high when compared to other cases involving far more egregious conduct. For example, a defendant in a telemarketing fraud case, whom the government told the jury was a “small-time con-artist,” received a sentence of *thirty* years, the low end of the advisory guideline range of 360-life.² The only significant difference between him and two of his co-defendants was that he received the four-level increase for being a leader/organizer. But the district court later sentenced the co-defendants to only ten and nine years, varying downward from their advisory guideline ranges by 90 and 132 months respectively, despite the fact that they had no more in the way

²This example comes from a case presently on appeal in the Fourth Circuit in which the author just submitted the opening brief.

of mitigating evidence than did the defendant who received thirty years. Moreover, that thirty-year sentence was far more time than Bernard Ebbers received for destroying WorldCom (twenty-five years), and far, far more time than John and Timothy Rigas received for bringing down one of the country's largest cable TV providers (fifteen and twenty years, respectively). And the thirty-year sentence is twenty years more than Jack Abramoff faces for faces for his aggravated role in corrupting our country's highest levels of government. While this may be an extreme example, it does illustrate the need for something more than the seemingly rubber-stamp approach to reasonableness review employed by the appellate courts thus far.

Second, the Supreme Court stated that "the [Sentencing Reform] Act continues to provide for appeals from sentencing decisions (irrespective of whether the trial judge sentences within or outside the Guideline range in the exercise of his discretionary power under § 3553(a))." 125 S. Ct. at 765. This statement strongly suggests that a sentence within the advisory guideline range is not automatically reasonable, but instead must be reasonable under *all* of the applicable § 3553(a) factors. See *Booker*, 125 S. Ct. at 794 (Scalia, J., dissenting)

(criticizing remedy majority for having reasonableness review "apply across the board, even to sentences within 'the applicable guideline range,' where there is no legal error or misapplication of the Guidelines").

Despite these statements, however, several circuits - including the Seventh - have unfortunately already determined that the advisory guideline range is presumptively reasonable. E.g., *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir.2005); *United States v. Mares*, 402 F.3d 511, 519 (5th Cir. 2005).; *United States v. Lincoln*, 413 F.3d 716, 717 (8th Cir. 2005).

And also despite the latter of the Supreme Court's statements, the government has sought to keep the guidelines effectively mandatory by arguing that the appellate courts have no jurisdiction to even hear appeals of within-range sentences that do not challenge the calculation of the range but only the district court's ultimate determination of the sentence. Two circuits, though, have recently rejected the government's jurisdiction arguments. See *United States v. Martinez*, ___ F.3d ____, 2006 WL 38541 (11th Cir. Jan. 9, 2006) (No. 04-12706); *United States v. Mickelson*, ___ F.3d ____, 2006 WL 27687 (8th Cir. Jan. 6, 2006) (No. 04-2324). Similarly, the Seventh Circuit has rejected the government's argument that after

Booker, it still cannot review a district court's refusal to depart downward. *United States v. Vaughn*, ___ F.3d ___, 2006 WL 29208 (7th Cir. Jan. 6, 2006) (No. 05-1518). The Third and Fourth Circuits have the issue under consideration. See *United States v. Elena Thomas*, No. 05-1588 (3d Cir.) (out of the Federal Defender Office in New Jersey); *United States v. Benigno Montes-Pineda*, No. 05-4471 (4th Cir.) (out of the FPD office in the Eastern District of Virginia).

In conclusion, *Booker* does not compel only district court judges to think of the defendants that come before them as individualized human beings. *Booker's* reasonableness review should compel the appellate courts to do the same. It is our job as defense attorneys, whether at sentencing or on appeal, to convince the courts to see our clients that way. To paraphrase what Chris Kelly so eloquently stressed above, when appellate judges review sentences to ensure that the sentencing judges have balanced all relevant factors, and when they no longer feel compelled to give controlling weight to the Sentencing Guidelines, then the potential of the *Booker* decision will be realized.

GOOD TIME STILL NOT AS GOOD AS IT COULD BE - BUT GETTING BETTER

Tony Hardman, Law Student, Regent University School of Law

In Issue No. 3 of *The Doing Time Times*, Spring 2003, we discussed calculating good time credit as provided for in 18 U.S.C. § 3624(b)¹ and the discrepancy that exists between the plain meaning of the statute and the way the BOP calculates it. Then in Issue No. 4, Spring 2004, we highlighted the decision in *White v. Scibana*,² a Western District of Wisconsin case that ordered the BOP to use fifty-four days per year instead of forty-seven when calculating good time credit. In this article, we provide an update on the litigation dealing with good time credit and where the courts currently stand on the issue.

To begin, the *White* case mentioned above has since been appealed to the

¹18 U.S.C. 3264(b) (1) states in relevant part: "[A] prisoner who is serving a term of imprisonment of more than 1 year other than a term of imprisonment for the duration of the prisoner's life, may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment."

²*White v. Scibana*, 390 F.3d 997 (7th Cir. 2004).

Seventh Circuit and reversed.³ The Seventh Circuit essentially followed the Ninth Circuit's lead in *Pacheco-Camacho v. Hood*,⁴ a 2001 case decided in which the court, using the *Chevron*⁵ test found that 1) the statute is ambiguous as to the meaning of "term of imprisonment," 2) the BOP's regulation that calculates good time at forty-seven days per year is a reasonable interpretation of the statute and is therefore entitled to the court's deference, and 3) the rule of lenity applies only if the *Chevron* test fails.⁶ As a matter of fact, in addition to the Seventh Circuit's decision in *White*, all of the circuit courts of appeal that have decided the issue have followed the holding of *Pacheco*.⁷

³ *White v. Scibana*, 390 F.3d 997 (7th Cir. 2004).

⁴ *Pacheco-Camacho v. Hood*, 272 F.3d 1266 (9th Cir. 2001).

⁵ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

⁶ The rule of lenity is a tool used by courts to help interpret statutes and "ensures that the penal laws will be sufficiently clear, so that individuals do not accidentally run afoul of them and courts do not impose prohibitions greater than the legislature intended." *Pacheco*, 272 F.3d at 1271.

⁷ *Perez-Olivo v. Chavez*, 394 F.3d 45 (1st Cir. 2005); *O'Donald v. Johns*, 402 F.3d 172 (3d Cir. 2005); *Yi v. Fed. Bureau of Prisons*, 412 F.3d 526 (4th Cir. 2005); *Brown v. McFadden*, No. 04-14132, 2005 U.S. App. LEXIS 13980 (11th Cir.

Only the Second and Tenth Circuits have not yet had a chance to weigh in.⁸

Next, some thought that the reasoning of the U.S. Supreme Court opinions in *Leocal v. Ashcroft*⁹ and *Clark v. Martinez*¹⁰ may persuade the courts of appeal to apply the rule of lenity¹¹ or "exhaust the aid of the 'traditional tools of statutory construction,' before deferring to an agency's interpretation of a statute."¹²

July 12, 2005).

⁸ Three Circuits have not yet decided the issue in published opinions but have otherwise indicated deference to the BOP's interpretation. The Fifth Circuit in *Sample v. Morrison*, 406 F.3d 310 (5th Cir. 2005) (per curiam), dismissed the case for ripeness but discussed the issue stating that if the court were to decide the issue, it would give deference to the BOP's interpretation. *Id.* at 312-13. The Sixth Circuit's unpublished opinion can be found in *Brown v. Hemingway*, 53 F. App'x. 338 (6th Cir. 2002). The Eighth Circuit's unpublished opinion can be found in *James v. Outlaw*, 126 F. App'x. 758 (8th Cir. 2005).

⁹ *Leocal v. Ashcroft*, 125 S. Ct. 377 (2004).

¹⁰ *Clark v. Martinez*, 125 S. Ct. 716 (2005).

¹¹ *Leocal*, 125 S. Ct. at 384.

¹² *Clark*, 125 S. Ct. at 736 (citation omitted).

*Mujahid v. Daniels*¹³ brought this argument before the Ninth Circuit but to no avail. The court held that the Supreme Court opinions did not make it clear as to when to apply deference and when to apply lenity and a court's established precedent, *Pacheco* in this case, can not be overturned by the reasoning of an opinion of a higher court unless the two cases are clearly irreconcilable.¹⁴

So when the circuits are well entrenched in favor of the BOP and the Supreme Court has not decided the issue yet, one may ask "what's the good news?" Well, as long as there are district courts that publish well reasoned and analytical opinions that expose the error of the BOP's interpretation, there is a chance to influence the courts of appeal to change their opinion and overturn past precedent. For example, the most recent district court case that challenges the BOP interpretation, perhaps even influenced by *Leocal* and *Clark*, is *Moreland v. Fed. Bureau of Prisons*¹⁵ out of the Southern District of Texas,

¹³ *Mujahid v. Daniels*, 413 F.3d 991 (9th Cir. 2005).

¹⁴ *Id.* at 999.

¹⁵ *Moreland v. Fed. Bureau of Prisons*, 363 F. Supp. 2d 882 (D. Tex. 2005).

where the court held that the interpretation violates:

(1) plain meaning and conventional usage, by translating "at" to mean "after;" (2) the canon of statutory consistency, by giving the same phrase different meanings within the same sentence; (3) the venerable rule of lenity, by construing a penal statute more harshly against the prisoner; and (4) congressional intent as reflected in the legislative history, by devising a more complicated good time system beyond the ready comprehension of inmates.¹⁶

If appealed, this opinion may have an influence on the Fifth Circuit, which has not yet squarely decided the issue but has merely commented on it in an opinion dismissing the case for ripeness. Likewise, it may influence a future opinion from the Second or Tenth Circuit that has not yet decided the issue either. Finally, if the Supreme Court were to decide the

¹⁶ *Id.* at 894.

issue based on the reasoning of *Leocal* and *Clark*, that would reverse the practice by the BOP and the matter would be settled.

NEW DEVELOPMENTS REGARDING PAST INELIGIBILITY FOR DAP EARLY RELEASE DUE TO FIREARM POSSESSION

Tony Hardman, Law Student, Regent University School of Law

In previous issues of *The Doing Time Times*, we provided information about the Federal Bureau of Prisons' (BOP) Residential Drug Abuse Treatment Program, or DAP.¹ Based on regulations released by the BOP in 1997, it was noted that at the discretion of the Director of the BOP, inmates whose current offense is a felony involving possession of a firearm or other dangerous weapon were ineligible to be considered for early release.² However, under *Paulsen v. Daniels*,³ a recent case decided by the Court of Appeals for

¹ See Issue 1, Winter 2002 and Issue 4, Spring 2004.

² 28 C.F.R. § 550.58(a)(1)(vi)(B) (2004); BOP P.S. 5162.04 § 7 (1997).

³ *Paulsen v. Daniels*, No. 03-35337, No. 03-35360, No. 03-35356, No. 03-35355, No. 03-35354, No. 03-35352, No. 03-35351, No. 03-35350, No. 03-35349, No. 03-35347, No. 03-35346, No. 03-35344, No. 03-35343, No. 03-35341, No. 03-35340, No. 03-35339, 2005 U.S. App. Lexis 12696 (9th Cir. June 27, 2005).

the Ninth Circuit, there may be a chance for early release to those denied eligibility between 1997 and 2000.⁴

The *Paulsen* court held that the BOP, in issuing the 1997 regulations, violated the Administrative Procedure Act (APA) making the regulations invalid from the time they were issued in 1997 until they were finalized in 2000.⁵ Once declared invalid, the default rule is the rule previously in force.⁶ The courts are then left to interpret the statute that provides for early release which describes conviction of a "nonviolent" offense as a requirement for eligibility.⁷ Unfortunately, the circuits are split

⁴ National statistics for those sentenced for use of a firearm during the years in question are given as follows: 1997 - 4.8% of 48,681 sentenced; 1998 - 5.0% of 50,605 sentenced; 1999 - 4.9% of 55,408 sentenced; 6.0% of 59,589 sentenced. U.S. Sentencing Commission, xxxx Datafile, OPAFYxx ("x's" represent the four and two digit year desired, respectively), available at <http://www.ussc.gov/LINKTOJP.HTM> (follow the link for the year desired and select any circuit or district to see the national statistic).

⁵ *Id.* at *21-22.

⁶ *Id.*

⁷ *Downey v. Crabtree*, 100 F.3d 662, 668 (9th Cir. 1996). The statutory provision for reduction in sentence is given in 18 U.S.C. § 3621(e) (2000).

on the interpretation of what is considered a “nonviolent” offense and the U.S. Supreme Court, along with the First and Second circuits, have not yet decided the issue.

Currently, the Third, Sixth, Eighth, Ninth, and Tenth Circuits hold that it *was not* a proper exercise of the BOP’s discretion to determine that possession of a firearm or other dangerous weapon along with a felony conviction *does not* qualify as a non-violent offense.⁸ Thus, if one of these circuits besides the Ninth decides a case like *Paulsen*, invalidating the 1997 interim regulations, it too is likely to “default” to the same interpretation of the statute. For example, if any inmate in one of these jurisdictions was denied a reduction in sentence due to possession of a firearm or other dangerous weapon, they may now be eligible for consideration. However, do not forget that early release is not guaranteed, but if eligible, up to a twelve month reduction in sentence *may* be granted at the BOP’s discretion.⁹

⁸ See *Royce v. Hahn*, 151 F.3d 116, 124 (3d Cir. 1998); *Orr v. Hawk*, 156 F.3d 651, 655-56 (6th Cir. 1998); *Martin v. Gerlinski*, 133 F.3d 1076, 1079-80 (8th Cir. 1998); *Paulsen*, *supra* note 3, at *21-22; *Fristoe v. Thompson*, 144 F.3d 627, 631-32 (10th Cir. 1998).

⁹ 28 C.F.R. § 550.58.

On the other hand, the Fourth, Fifth, Seventh, and Eleventh Circuits hold that it *was* a proper exercise of the BOP’s discretion to determine that possession of a firearm or other dangerous weapon along with a felony conviction *does not* qualify as a non-violent offense.¹⁰ Thus, even if one of these circuits invalidates the regulations as in *Paulsen*, inmates denied eligibility for early release due to possession of a firearm or other dangerous weapon are not likely to find the court willing to change that decision.

For now, the first step for inmates, other than in the Ninth Circuit, is to challenge the validity of the 1997 regulations. Then the interpretation argument may be made for early release.

¹⁰ See *Pelissero v. Thompson*, 170 F.3d 442, 447-48 (4th Cir. 1999); *Warren v. Miles*, 230 F.3d 688, 694 n.4 (5th Cir. 2000); *Parsons v. Pitzer*, 149 F.3d 734, 737-38 (7th Cir. 1998); *Cook v. Wiley*, 208 F.3d 1314, 1320-22 (11th Cir. 2000) (distinguishing conviction of possession with a sentence enhancement for possession).

PROPOSED LEGISLATION TO AMEND GOOD TIME, RETURN FEDERAL PAROLE AND INCREASE COMPASSIONATE RELEASE

Doing Time Times receives numerous inquiries regarding legislation changing good time calculation under 18 U.S.C. § 3624 (b). Contrary to the rumor mill, there has been no such change. However, in June 2005, U.S. Representative Danny K. Davis of Illinois introduced H.R. 3072, a bill to change not only good time but also to revive parole for Federal prisoners and amend Compassionate Release.

Good Time

The bill proposes to calculate good time based on length of sentence. For a sentence of more than six months and less than one year, an inmate would be entitled to five days for each month. For a sentence of more than one year but less than three years, an inmate would be entitled to six days for each month. For a sentence of at least than three years but less than five years an inmate would be entitled to seven days for each month. An inmate would be entitled to eight days for each month if the sentence is at least than five years and less than ten years. Finally, an inmate would be entitled to ten days for each month if the sentence is ten years or more.

Additionally, the proposed legislation would allow for "industrial good time," which allows for up to three additional days of good time for "superior program achievement."

Federal Parole

The proposed bill would make a prisoner serving a sentence of more than one year eligible for release on parole after serving one-third of the sentence or eligible for release after serving ten years of a sentence of over 25 years or life.

The bill would also give the sentencing judge the authority to either designate a minimum term at the expiration of which the prisoner shall become eligible for parole, which may be less, but not more than 10 years; or fix the maximum sentence to be served.

Compassionate Release

H.R. 3072 would also change compassionate release. Currently under 18 U.S. C. 3582(c) the court may reduce a sentence for compassionate reasons if the defendant is at least 70 and has served 30 years in prison. The proposal would lower the requiring age to 65 after serving 25 years of prison. Additionally the Bureau of Prisons would be required to consider release if the prisoner met the age requirement, had served 25

years and had no violation for violent aggressive conduct.

To date, this bill has been referred to the House Committee on the Judiciary with no further reported activity. It has eight cosponsors. The full text of this proposed bill can be downloaded and tracked at <http://thomas.loc.gov>.

GANG DETERRENCE AND COMMUNITY PROTECTION ACT OF 2005

On May 12, 2005, the United States House of Representatives passed the Gang Deterrence and Community Protection Act of 2005 (H.R. 1279). This bill would provide for jurisdiction for a number of “gang related” offenses under federal jurisdiction and would make them eligible for a number of new mandatory minimum penalties. For example, the bill would create the following penalties for “gang-related” crimes: 30 years to life for kidnaping, aggravated sexual abuse or maiming; 20 years to life for assault resulting in serious bodily injury and 10 years to life for any other gang related crime.

The legislation would define a “criminal street gang” broadly as a “formal or informal group or association of 3 or more individuals, who commit 2 or more gang crimes

(one of which is a crime of violence), in 2 or more separate criminal episodes.” The bill would also permit prosecutors to transfer to adult court any juvenile 16 or older who is charged with a crime of violence. The Senate has introduced a competing anti-gang bill that does not include the additional mandatory minimum sentences.

Proponents of the bill maintained that the legislation was needed because of an increase in the number of violent, gang-related crimes. Opponents note that stiff penalties are already in place at the state level to address violent gang activity, and that the provisions in this bill threaten to overextend the federal judicial system.

The full text of this bill can be obtained and tracked at <http://thomas.loc.gov>. For additional information also check Families Against Mandatory Minimums, www.famm.org, and The Sentencing Project, www.sentencingproject.org.

ARTICLES & LETTERS FROM INMATES

REQUESTING TRANSFERS

Michael G. Santos, Inmate, USP Lompoc,
www.michaelsantos.net.

After an offender arrives at his designated facility, and as he progresses through his sentence, circumstances may change which may require transfer to another facility. Usually, prison transfers occur because of changes in the prisoner's security-level scoring, but sometimes prisoners may request transfers to other similarly-rated facilities for their own reasons. Generally, case managers will not process a prisoner's request for transfer unless the individual has served at least 18 consecutive months of confinement in the institution with disciplinary-free conduct.

The Bureau of Prisons' inmate population has increased dramatically over the past several years. When I began serving my sentence, in 1987, fewer than 30,000 people were serving sentences in the federal system; the number of federal prisoners now approaches 150,000. The prison system is crowded, and several new prisons open each year.

Accordingly, even if an inmate meets the necessary criteria for transfer, his request to serve his sentence in a

particular facility may or may not be granted. When a prisoner requests a specific facility, he subjects himself to the discretion of regional designators, who may attempt to honor the prisoner's request for a specific institution, but prisons within the BOP. So, a request to transfer to the Federal Correctional Institution in Miami may result in a transfer to the Federal Correctional Institution in Beaumont, Texas.

Prisoners may wonder whether there is anything they can do to enhance their chances of moving to a particular facility. Based on my lengthy experience of living as a prisoner in the Bureau of Prisons, the formal answer is no; the informal answer is possibly.

Initiating Transfer Request

In order to initiate a transfer, inmates must first request their respective case managers to process the transfer paperwork. Usually, the case manager will accept these requests for transfer during the regularly-scheduled unit-team meeting; for inmates with longer than two years to serve, the ten-minute team meetings are scheduled twice each year. Inmates with less than two years until their release dates have team meetings every three months.

If the inmate has 18 months of disciplinary-free conduct, and his

security rating is consistent with the institution to which he wants to transfer, the case manager may agree to process the initial paperwork requesting a transfer. The case manager will pass it on to the unit manager, the case manager coordinator, and then to the warden of the facility for approval. If all parties at the local institution agree to the transfer, the case manager will forward the paperwork to the regional designator, who will make the final decision as to where the inmate will be transferred.

Informal Influence on Prisoner Classification

Because the case manager, the unit manager, the case manager coordinator, and the warden all must agree to the transfer before the request will proceed to the regional designator, some inmates try to develop close ties with these staff members. A few inmates will get along well with those staff members and their requests to transfer may be successful; others will not be so fortunate. Indeed, although staff members may tell the inmate that a transfer request to a specific institution may or may not be granted, in reality, a staff member can make a call to the regional designator and help an inmate's chances of being designated to a specific institution.

For example, Steven, a close friend of mine, tells me about his transfer to Fort Dix from Raybrook in upstate New York. When his security level dropped from medium to low, his case manager told him that he had been designated to a low-security facility in Ohio. Steven, who had developed a friendship with his case manager, told the case manager he wanted to transfer to Fort Dix, as it was closer to his home in New York City. The case manager said he would call the regional designator and see whether the designation might be changed. Later that evening, the case manager came by Steven's room and told him the regional designator agreed to make the move and that Steven officially had been manager, this transfer would not have been changed, and he'd be serving his sentence much farther away from home.

During all of the years I have been confined so far, I've had one case manager who made the extra effort to help me transfer to a specific prison. I had been confined at USP Atlanta for the first seven years of my sentence, and when I was ready to transfer to a medium-security prison, I asked my case manager to send me to FCI McKean, in Bradford, Pennsylvania. The transfer would not be routine because my residence is in Seattle, a long ways from Pennsylvania.

I wanted to transfer to McKean, in the BOP's Northeastern region, because my understanding was that the warden at McKean was very supportive of educational programs. Ms. Forbes, my case manager in Atlanta, and Mr. Chester, my unit manager, were supportive of my educational goals, and they persuaded the regional designator to transfer me to McKean. That transfer occurred in 1992. Since then I've been transferred four times, but not once to a facility I requested.

Despite my limited success in arranging transfers to specific prisons, other inmates have told me their good relationships with certain staff members has helped them secure transfers to desirable prisons. These inmates may have developed closer relationships with these staff members through work details or other institutional contact, or as many cynical prisoners would suggest, inmates may provide services or act as informer to staff members in order to receive special treatment.

Whatever the circumstances of inmate/staff relationships, there is no question in my mind that case managers, unit managers, case manager coordinators, and wardens can assist their favored inmates in transferring to specific facilities.

Whether they make the extra effort is their own decision.

Besides lobbying staff members from the local institution, a more aggressive approach may be to lobby the regional designator. This can be done individually by writing letters to the regional designator, but doing so may result in the designator writing back to the inmate with a reprimand and instructions that all transfer requests should originate with the inmate's unit team.

Still, I know one individual who wrote to his regional designator explaining the reasons why he thought his public safety should be waived and that he should be transferred from the low-security facility in Yazoo, Mississippi to a prison camp; soon after he wrote the letter he was told the region had re-designated him to the prison camp Eglin, Florida. So, in his case, writing to the region proved effective.

Instead of the inmate contacting the regional designator, an inmate may have his family members and people from his network of support lobby the regional designator to transfer him to a specific institution. BOP administrators may be much more receptive to listening to law-abiding taxpayers who support an inmate than listening to the inmate himself.

Perhaps the best assistance in transfer requests can come from representative of Congress. Many inmates and their families have written to their Senators and Representatives requesting them to intercede and communicate with the Bureau of Prisons in an effort to arrange a transfer for individual inmates. The Senators or Representative usually do write a letter on behalf of inmates requesting assistance, and the warden usually designates the case manager to respond. This type of Congressional intervention has been helpful to many offenders requesting transfers.

Finally, another technique that prisoners with resources employ is hiring a Bureau of Prisons consultant, BOP consultants can be helpful because they have nurtured relationships with BOP staff members who have decision-making authority. Indeed, BOP consultants generally have legal backgrounds and have developed a practice solely to represent prisoners on post-conviction matters; other BOP consultants previously had extensive careers working for the BOP itself and are in a good position to use their relationships within the system to help inmates arrange transfers and handle other problems that sometimes arise during the course of one's confinement.

Relationships go a long way in obtaining desirable results in not only arranging transfers but also in every other aspect of confinement. Good relationships with staff members can lead to better jobs, and less severe sanctions in the event an individual receives a disciplinary infraction.

New prisoners coming into the federal prison system should look at their sentences from a long-term perspective, because the BOP will make a record of all the prisoner's actions. Although there is nothing the prisoner can do to enhance his classification or treatment formally, there are many bad decisions he can make that will cause him to serve his term with significantly more obstacles.

Because most BOP actions are administrative in nature, leaving inmates with little meaningful recourse once a decision has been made, it is wise to think every decision through. Question how a particular action will contribute to the individual's overall plan. If the individual has no plan and doesn't care where or how he serves his time, then perhaps nothing does matter. The individual who is trying to make some personal achievements during his term in confinement and complete his term in the quickest, least onerous manner possible should strive to find balance in his life, choose his

acquaintances carefully, and stay out of trouble.

One doesn't have to behave obsequiously to staff, but a prisoner should recognize that he'll never win in an inmate/staff confrontation, and good relationships are better than bad.

INMATES PAYING FOR HEALTH CARE

Rose Cisler, Former Inmate, FMC Carswell

BOP Program Statement 6541.01, entitled "Over-The-Counter Medications" dated September 10, 2003, states in part that "Personal resources will be used by inmates to obtain OTC medications that are indicated for cosmetic and general hygiene issues or symptoms of minor medical ailments." These medications will be available in the institution commissary/canteen.

The cost of health care across the country has skyrocketed and the BOP system is no exception. However, when an inmate's job salary pays .12 cents per hour, (average \$20 per month) the reality of purchasing these OTC medications is resulting in a drastic decrease in the overall health and well-being of the BOP general population.

At FMC Carswell, a women's medical center, the following items are available for purchase on commissary with prices listed as of June 2004:

Vitamin A&D Ointment (<3ozcontainer)	\$1.75
Claritin	\$8.60
Triple Antibiotic Cream	\$4.50
Pepcid	\$5.20
Gaviscon	\$4.20
Sucrets	\$4.00
Clearasil Soap	\$3.55
Antifungal Foot Cream	\$1.6
Liquid Antacid	\$3.30
Oral Gel	\$2.15
Hemorrhoid Ointment	\$2.35
Kaopectate	\$6.00
*Childrens Expectorant	\$6.00
Milk of Magnesia	\$3.00

*Unable to have adult cough medicine due to alcohol content in adult strength

This is just a sampling of what inmates are expected to pay at FMC Carswell.

Yes, inmates who can prove they are indigent are allowed to get certain items. An indigent inmate means an inmate with an average daily account balance on their books of \$6.00 for the past 30 days.

Inmates are also expected to purchase their own hygiene products at some facilities. As of July 2003, FPC Pekin issued a memo stating that inmates

were no longer having unlimited availability to maxi pads and tampons. Tampons were discontinued and are available only on commissary for \$6.80 per box of 12-18 depending on brand available. Maxi pads are issued through laundry. Each inmate is allowed 24 pads per month. These are not top of the line products. Most inmates say that due to the quality of the product that it requires wearing two or more at a time. Inmates are allowed to purchase Always brand on commissary at approximately the same cost as tampons at \$6.80 per 12.

What is wrong with paying for your own OTC? Nothing, but the cost. The cost of any item on commissary has an additional mark up which the BOP states "provides funding for inmate recreational programs." The only thing more annoying about that statement is a complete and different article on BOP recreation.

At .12 cents an hour, I, an inmate, need to work 37.6 hours to buy one tube of Triple Antibiotic Cream. That is exactly how many hours I worked that week. It costs to be in prison.

RESOURCES FOR INMATES

PRISON CONTACT INFORMATION

In this issue we only list prisons in the North Central Region. For other federal prisons, check www.BOP.Gov or Federal Prison Guidebook by Alan Ellis.

FCI Oxford
Box 500
Oxford, Wisconsin 53952-0500
Phone: 608-584-5511

FCI Waseca
P.O. Box 1731
University Drive, S.W.
Waseca, Minnesota 56093
Phone: 507-835-8972

USP Terre Haute
Highway 63 South
Terre Haute, Indiana 47808
Phone: 812-238-1531

FCI Pekin
P.O. Box 7000
Pekin, Illinois 61555-7000

MCC Chicago
71 West Van Buren
Chicago, Illinois 60605
Phone: 312-322-0567

FPC Duluth
P.O. Box 1400
6902 Airport Road
Duluth, Minnesota 55814
Phone: 218-722-8634

USP Marion
4500 Prison Road
P.O. Box 2000
Marion, Illinois 62959
Phone: 618-964-1441

FCI Englewood
9595 West Quincy Avenue
Littleton, Colorado 80123
Phone: 303-985-1566

FCI Milan
P.O. Box 9999
East Arkona Road
Milan, Michigan 48160
Phone: 734-439-1511

ADX Florence
P.O. Box 8500
5880 State Highway 67 South
Florence, Colorado 81226

FMC Rochester
P.O. Box 4600
Rochester, Minnesota 55903-4600
Phone: 507-287-0674

FCI Florence
P.O. Box 6500
5880 State Highway 67 South
Florence, Colorado 81226
Phone: 719-784-9100

FCI Sandstone
P.O. Box 999
2300 County Road 29
Sandstone, Minnesota 55072
Phone: 320-245-2262

USP Florence
P.O. Box 7500
5880 State Highway 67 South
Florence, Colorado 81226
Phone: 719-784-9454

MCFP Springfield
P.O. Box 4000
1900 West Sunshine
Springfield, Missouri 65801-4000
Phone: 417-862-7041

FCI Greenville
P.O. Box 4000
100 U.S. Route 40
Greenville, Illinois 62246
Phone: 618-664-6200

FPC Yankton
P.O. Box 680
1016 Douglas Avenue
Yankton, South Dakota 57078
Phone: 605-665-3262

USP Leavenworth
1300 Metropolitan
Leavenworth, Kansas 66048
Phone: 913-682-8700

ACKNOWLEDGMENT

We extend our appreciation to Chris Kelly, Professor Douglas Berman and Fran Pratt for their insightful contributions.

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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