



Issue No. 3

Out Front

The Doing Time

Times

Spring 2003

Federal Defender Services of
Eastern Wisconsin, Inc.

This issue of *Doing Time Times* marks the first in which we offer letters and articles from current and former BOP inmates. Those are good contributions. Try as lawyers might, they do not know the intricacies of life in a BOP institution.

We encourage more letters or submitted articles from those inside, and those recently released. While we may correct spelling or punctuation, we will reprint such submissions without substantive editing. Prospective writers should consider what best will serve current and future defendants in federal criminal cases, and indirectly, their lawyers who want to help. General griping has its place, but usually does not provide much guidance to the next person who will confront the same, or a similar, problem. Sound advice on how to solve or avoid the problem is more useful.

Thanks, therefore, to the men and women who wrote to us for publication. We have given all of them *noms de plume*, and will continue that unless a writer specifically asks us to identify him or her by name. Ordinarily, the writer's name is not important to our readers (and we are not interested in providing information that may be important only to BOP, unless it benefits those in BOP's custody). But what these writers have to say may be very important.

Much of the rest of this issue focuses on good time and community corrections. Of late, these are hot topics. Unfortunately, we do not have good solutions to offer for BOP's good time calculation. That formula has the effect of preserving and marginally increasing BOP's claims of budgetary need — always a bureaucratic imperative — while chiseling both inmates and American taxpayers. The more time inmates do, the greater BOP's claimed need for money and staff. At least, shining more light on that cynical institutional strategy cannot hurt.

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GOOD TIME

What is good time?

The Comprehensive Crime Control Act of 1984 defines good time credit as “credit towards the service of the prisoner’s sentence, beyond the time served, of up to 54 days at the end of the first year of the term, subject to determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations.”

Who calculates good time?

The Bureau of Prisons (BOP) is charged with calculating good time credit as well as determining whether the prisoner qualifies for the credit.

When is it calculated?

The BOP calculates the yearly good time credit at the end of each year of incarceration.

How does the Bureau of Prisons calculate good time?

The calculation of good time credit is an area of serious dispute. On the one hand the statute, 18 U.S.C. § 3624(b)(1), clearly states that a prisoner is entitled to a maximum of 54 days credit for each year of

his/her sentence. The BOP has construed the statute to mean that the prisoner is entitled to a maximum of 54 days for each year served. This is no small distinction for any prisoner, especially for those serving a long term of imprisonment.

Within the Comprehensive Crime Control Act of 1984, which established federal sentencing guidelines, Congress included a good time credit provision. In later Congressional debates, the legislative history reveals Congress’ twin goals for the provision: 1) to establish a simple method for calculating the credit; and 2) to eliminate the cumbersome and confusing process that was then in place.

After rejecting a proposal for a flat 10% reduction for good time, Congress approved a 15% maximum reduction in a term of imprisonment. Senator Biden’s words are particularly on point: “In the federal courts, if a judge says you are going to go to prison for 10 years, you know that you are going to go to prison for at least 85% of that time - 8.5 years, which is what the law mandates. You can get up to 1.5 years in good time credits, but that is all.” Cong. Rec. S2348-01 (February 9, 1996). The maximum good time credit enacted by Congress was 15% or 54 days for each year of sentence.

The BOP, in establishing rules for administering the good time credit, misconstrued the intent of Congress as well as the plain meaning of the statute and determined that the 15% reduction applied not to the term of imprisonment handed down at sentencing, but to the actual time served. Simply stated, a prisoner must serve 365 days before any good time credit is given. Therefore, each year of a sentence does not yield 54 days of credit. The BOP's complicated calculation reduces the year of sentence by 15% (= actual time served minus the potential maximum good time credit) and then reapplies the 15% reduction to come up with the actual good time credit. This calculation yields a maximum of 47 days per year in good time credit.

Example based on a 5-year term of imprisonment:

Calculation by statute:
365 days/year x 5 years = 1825 day sentence.
1825 days x 15% good time reduction = 274 days potential credit.
1825 - 274 = 1551.
1551- Total days served with maximum credit.

Calculation by BOP:
365 days/year x 5 years = 1825 day sentence.
1825 days x 15% time served reduction = 274 days served reduction.
1825 - 274 days served reduction = 1551 days served.

1551 days served x 15% good time credit = 233 days potential credit.
1825 - 233 = 1592.
1592 - Total days served with maximum credit.

The disparity between the calculations for a 5-year sentence results in a prisoner serving 41 days more than Congress anticipated and the statute allows. An inmate sentenced to a 10-year term could lose 70 days in good time credit - - more than 2 months. An inmate serving a 20-year sentence who receives the BOP maximum good time credit will still end up serving 140 more days in prison than Congress envisioned.

What can lawyers do when good time is miscalculated?

The National Association of Criminal Defense Lawyers (NACDL) has instituted The Pleistocene Project in an "effort to end illegal over-incarceration of federal prisoners based on misconstruction of 18 U.S.C. § 3624 (b)." For more information go to www.nacdl.org.

After exhausting all administrative options, lawyers are encouraged to litigate the issue of BOP's misconstruction so as to develop decisional law in this area.

What can clients do?

Clients should inform themselves of the requirements to receive good time credit. The BOP looks at whether the inmate has "displayed exemplary compliance with

institutional disciplinary regulations” In the program guidelines, the BOP cites riots, food strikes, work stoppages, etc., as specific examples of misconduct. (Any disciplinary infractions must be noted in the SENTRY disciplinary log - can an inmate review and contest the entries?). In addition, inmates are empowered to appeal the good time credit they receive under the Administrative Remedy Program. The Administrative Remedy Program (BOP guidelines § 542.10) provides inmates with a mechanism to “seek formal review of an issue which relates to any aspect of their confinement.” Information on the Administrative Remedy Program is available at the Bureau of Prisons website, www.bop.gov.

Resources

The September/October issue of The Champion, available at www.nacdl.org, gives an excellent explanation of the good time calculation discrepancy. The web site also provides sample briefs and memoranda for lawyers willing to litigate this issue.

PAYMENT OF RESTITUTION

What is the Inmate Financial Responsibility Program?

At sentencing, the judge may order a defendant to make restitution as well as to pay certain fines and court costs. The Inmate Financial Responsibility Program (IFRP) is the arm of the BOP which is charged

with establishing a restitution plan for each inmate. When inmates enter the prison system, they’re encouraged to work with staff to develop an individual repayment plan.

What are the BOP guidelines for restitution payment?

Restitution payments may be drawn from an inmate’s income while incarcerated as well as from outside sources of income. In determining the monthly payment amount, the prison staff who manages the IFRP will exclude \$75 of earnings which the inmate is able to keep in an account for telephone and personal expenses. Inmates who have a grade 5 UNICOR job or are non-UNICOR, must make a \$25 minimum payment per quarter. UNICOR is the trade name for BOP’s industrial work program. Inmates with grades 1 through 4 UNICOR jobs are to devote not less than 50% of their earnings to their repayment plan.

What are the consequences if an inmate refuses to participate in the IFRP?

While the repayment plan is considered voluntary, the restitution is not. Therefore, inmates who do not participate in the IFRP or do not meet the requirements of their repayment plan will find themselves deprived of many opportunities:

a) For prisoners sentenced before the Sentencing Reform Act of 1984 took effect, the Parole Commission will be

notified that the inmate is not cooperating.

- b) Furloughs, except those in the case of emergencies, will be denied.
- c) No performance pay, bonus pay, or vacation pay will be awarded.
- d) The inmate will not be allowed to work outside the prison facility.
- e) The inmate will not receive a UNICOR job placement.
- f) The inmate's commissary spending will be severely limited.
- g) The inmate will be housed in the lowest housing status.
- h) The inmate will not be placed in a community-based program.
- i) The inmate may not receive a release gratuity.
- j) The inmate will not receive any incentive for participation in a residential drug treatment program.

COMMUNITY CONFINEMENT CHANGE

As of December 2002, the BOP ceased to honor judicial recommendations to place inmates directly into community correction centers (CCCs), halfway houses, or other forms of community confinement for the imprisonment portions of their sentences.

This means that all inmates serving terms of imprisonment will be designated to prison or jail facilities. It had been a 15-year practice of BOP to place some low-risk, non-violent offenders with short prison terms directly into CCCs. While the BOP has broad discretion in designating

inmates, the Justice Department has taken the position that the term "imprisonment" is not synonymous with "community confinement," so BOP does not have discretion to place offenders serving sentences of imprisonment in community corrections centers.

The prior BOP practice had been supported by many federal prison officials and defense attorneys as a way to lessen prison crowding and encourage rehabilitation. DAN EGGEN, *White-Collar Crime Now Gets Real Time*, WASHINGTON POST, JANUARY 7, 2003, A06. However, federal prosecutors had argued that it allowed wealthy white collar criminals to circumvent the sentencing guidelines. *Id.*

The BOP is now limiting all halfway house placements to the last 10% of a prisoner's sentence, not to exceed six months pursuant to 18 U.S.C. § 3624(c). This new policy was prospective for the most part except that it applied retroactively to inmates assigned to CCCs who had more than 150 days remaining on their prison terms as of December 16, 2002. An estimated 132 inmates nationwide were affected by the 150-day rule. Forty-five of those were women.

Defense attorneys have filed, in federal courts nationwide, more than 24 objections to the retroactive application of the BOP policy change since implementation. A handful of challenges thus far have been

successful. For example, in January 2003, a district judge in the District of Columbia blocked the transfer of a convict from a halfway house to a federal prison. *Culter v. United States*, No. CR. 01-439, No. Civ. A. 03-0106, 2003 WL 184022 (D.D.C. Jan. 27, 2003). In that case, the court relied on unique facts, due process, and equitable estoppel to preclude BOP from using its new policy to remove the convict from a local halfway house to a federal prison. The court stated that it was arbitrary and unfair for the government to “imprison petitioner merely because BOP was misguided about the scope of its authority and this misinterpretation was fostered and shared by both the Executive and Judicial branches for more than fifteen years.” *Id.* at 6. The court did not address the prospective application of the Justice Department’s interpretation of imprisonment or the correctness of BOP’s revised policy.

A motion for an emergency stay of BOP’s reclassification is included on pages 12-16 as an example.

LETTERS FROM INMATES

Doing Time Times asked clients to submit letters about BOP and doing time. Here are some of their replies.

Restitution

Lawyers need to know to do a better job at sentencing. What I witnessed

when I had the chance to review inmate paperwork when I in the Oklahoma City Transfer Center (work cadre) and Oakdale Federal Prison Camp, Oakdale, Los Angeles, was inexcusable. For example, in the drafting of the Judgment and Commitment order (hereinafter “J&C”) the attorneys need to do a better job in pinning down what amount an inmate is supposed to pay while in custody. Whether in an exact dollar amount or in many instances the J&C is vague or even silent on what goes into the calculation. Should outside funds deposited into the inmate’s account be considered for purposes of calculating an Inmate Financial Responsibility Program (IFRP)? Do payments begin while in custody or after release to probation? Are the payments in exact dollar amounts or expressed as a percentage of the inmate’s earnings? If these things are not specifically spelled out, the staff will treat the aggregate of all monies deposited to the inmate’s account as a source of payment. Calculations will be made from the sum unless the J&C says something different. Is the staff to look just at prison earnings? All of the above can be spelled out in detail in the J&C and it will help the inmate avoid unnecessary conflicts with the prison staff.

Remember, if the J&C is in the least bit vague on any of these questions, the staff will exact payment at the highest amount permitted under the program statement. This was the

subject that created much unneeded trouble for the inmates. IFRP becomes the hot topic for “team meetings.” It is also a source of much unnecessary friction with staff.

Thus, the lawyers need to do a better job of asking the Court to specify 1) the source of payment, 2) the amount of payment (on a monthly basis) either by a fixed dollar amount or by a fixed percent of prison wages. The fixed percentage of prison wages is a better solution unless the court fixes a number that is extraordinarily low. The percentage approach allows the court to hedge against what an inmate might earn. Obviously, the more the inmate earns, the greater the payment, but at least the BOP is not taking the funds sent in by family and friends. If defense attorneys don’t get this included in the J&C or the J&C is in the least bit vague, staff will take it upon themselves to figure it out “what the court meant” even if it means re-writing the J&C to suit their ends. Believe me, they never assess a payment that is in the inmate’s favor. Once the staff commits to this course, the only recourse for the inmate is to take an administrative appeal and then seek review via habeas. These decisions are rarely overturned. And, the courts aren’t sympathetic if it gets that far.

Other language that can be successful in keeping the BOP at bay is “payments to begin upon commencement of supervised

release.” Even with this language in place, staff will try to “persuade” the inmate to make payments voluntarily. Once he agrees and 2-3 payments are made at the next “team meeting “ staff takes the position that the inmate waived his right to stand on the terms of the order. So, the inmate finds himself making ever increasing payments between review periods.

The solution is to get the terms spelled out at the beginning in the J&C otherwise, staff will screw over the inmate at every opportunity. When the inmate finally objects or challenges the schedule of payments, a “refusal” status is created which results in the loss of privileges for inmate.

Anonymous

Camp

Other than the time I spent at the half-way house after sentencing, which was about 3 weeks, it took about 22 hours by bus for me to get to my destination.

Camp is a lot like college, with the inmates doing all the work around here. There is a GED school, if you can call it that, and other classes for the drug program. There is medical help. The thing to do is to keep yourself busy. They have basketball, baseball, and football teams. A running or walking track. They also have a weight room and a place for other games like pool and cards.

You need money to live in here, clothes and shoes, food and everything costs. It's a business. I came with about \$400 that lasted about 5 weeks. When you get here the people do not know you or what you did. If you self-surrender it might keep you out of the "hole." Those who are brought here will be placed in the "hole" for 3 to 4 weeks before they even see the camp.

What you should know about Bureau of Prisons is that they set the rules. You follow them. If not, you will go to the "hole." About it being a business-it costs to have things. They also want you to pay fines. So what do you do when you run out of money and have no friends on the outside to help you? You go to the "hole."

What do I wish I had known about prison? There are some things only being here will answer.

Darrow Cardozo

BOP Staff

It appears that there is a breakdown in the hiring process of the BOP. For lack of a better phrase lets say "a breakdown in the screening process of its employees." Logic would state if you're going to incarcerate an individual for a prolonged period of time, the system should employ staff capable/responsible enough to manage them. Instead you have a non-productive organization that is a

burden on tax payers' dollars. The American people pay their hard earned tax dollars to the government for numerous reasons. One being to the Justice System. Our hard earned dollars should not be used inadvertently to produce new/repetitive criminals.

The staff members of the BOP are in the business of creating and perpetuating mind sets among inmates that only lead to the furtherance of crime. Instead of doing the various jobs assigned to them to help maintain the orderly running of the institutions, they feel that the inmates/system owe them something. Literally it almost takes an Act of Congress to get any paperwork done. The majority of the staff choose to hide and give excuses as to why they can't do their jobs.

This behavior pattern adds fuel to an already flaming inmate fire and especially if one is doing numerous years. Trying to use the system for the betterment of one's situation can and sometimes is explosive.

Geographically/regionally, when one travels throughout the system, one is forced to deal with a variety of attitudes and ideologies from various staff members.

I wonder if the American people have any clue that their money is being used to finance a form of internal terrorism - clansmen disguising as correctional officers,

undercover gang members perpetrating as staff and pledging their allegiances “not to serve and protect” but to inmate gang members, lastly Mafioso connected staff. Secretly throughout the regions this is the mind set and hearts of those who are employed to protect society. Yes, this may sound unbelievable but remember people did not believe the horrors that took place behind the Iron Curtain/Nazi Germany. Of course, I expect they will not believe what goes on behind the BOP. Society will find their proof when one of their loved ones has to experience this reality.

Grisham Turow

Doing Time

My experience is at Oxford Camp and MCC-Chicago. At Oxford Camp for six weeks, I spent a little time each day on washing dishes after each meal, the rest of the time doing what I wished within the constraints of limited facilities. There was a track and a chinning bar. Congressman Zimmerman, fearing convict monsters, prohibited strength building devices. The library consisted primarily of conversation which was the inmate’s *raison d’etre*. His only problem is that he did not know whom to trust, as many conversations could result in someone gaining sufficient knowledge about him to fabricate a convincing tale that might be used to trade time.

Moved to MCC-Chicago I have not been out of the building for the past four years. My space is less than that allotted by the Nazis to their concentration camp inmates. And they were not so confined nearly as long, about the 90 days the Supreme Court allowed in *Bell v. Wolfish* as unobjectionable for the kinds of conditions to which MCC inmates are subjected. I live in a toilet with a stranger, sleep on a mattress three inches thick which covers a wooden slab. I am allotted three sets of clothing, underwear shock orange jumpsuit, which goes to a bulk laundry wadded in a bag twice a week. Anything more than that is contraband. For possession of contraband, I may be disciplined. I would worry about that except that any punishment meted by the BOP is so arbitrary and capricious that I have no defense. Total innocence and ignorance are not defenses, as “all inmates are responsible for what goes on in their areas.” Whatever the BOP says, goes. Nor can there be any reliance. Whatever the particular staff on duty (the BOPer’s) say goes, even though it changes with each BOPer and from day to day, each of which, by the way, is the same. The only possible defense is a low profile. What one needs may be denied or taken arbitrarily. One must provide for oneself because all requests are routinely ignored. The BOPer is taught to divert inmates and to avoid confrontation. This is best accomplished by promises which are

not kept. Therefore an inmate cannot rely on a BOPer.

What is the consequence? The BOP reinforces all the assumptions that likely caused confinement, lack of trust, despair in the fact of impossible conditions without escape other than through deception and cheating. The BOP returns the victim of a broken, unjust society to that society just as he was, wisdom to pursue what he did before incarceration more cautiously and with greater finesse so that he will not again be caught.

In sum, the BOP is a negative force on its charges and, by the very act of fulfilling its mission to society.

Learned Hand Finch

Families

What families should be advised about BOP and/or doing time?

In my opinion, families should be told how very important it is to keep in contact with your loved one who is incarcerated. You cannot imagine what it does to hear your name called at mail call. You don't have to always make your letters happy and cheerful, even telling your loved one that is incarcerated, the unhappy home news makes them feel still involved in families' lives. Families should know that inmates are not allowed to vent their frustrations in person, and many times will vent to

the family. While they are not trying to lay it all on them, they just need to vent and what better place than where you are loved unconditionally.

Thurgood Holmes

General Advice

What lawyers should advise clients about doing time? Don't make your crime common knowledge, a simple statement of what you did is sufficient. Don't tell why you are getting time off your sentence and do not gossip, it will get turned around and not to your advantage. Follow the rules, as to those "in charge" this is important. Basically keep your self as busy as you can and keep your nose clean. Never give up hope of going home earlier than your sentence but don't let it destroy you if it doesn't happen. Don't let your time do you. Just do your time.

Abby Landers

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

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ACKNOWLEDGMENTS

Doing Time Times thanks Marquette University Law School students Elizabeth Bruderle-Baran and Deborah Phillips for their hard work on this issue.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

United States of America

Plaintiff,

v.

Case No.

John Doe,

Defendant.

**MOTION FOR EMERGENCY STAY OF
BUREAU OF PRISONS' RECLASSIFICATION**

Defendant, John Doe, respectfully moves that this Court order the Bureau of Prisons to stay its order requiring him to leave the Coolidge House - - where he has, since November 4, 2002, been serving the sentence imposed by this Court -- and report to FPC Lewisburg. *See* Exhibit A, attached hereto¹. As it now stands, Mr. Doe is to report to Lewisburg on January 27, 2003.

This order results from a change in BOP policy, instituted after Mr. Doe was placed at the Coolidge House, in accordance with the Court's recommendation. *See* December 23, 2002, letter from Community Corrections Manager, attached as Exhibit B; Judgment, attached as Exhibit C. Defendant

¹ Although the paperwork attached indicates that Mr. Doe is to report to the penitentiary at Lewisburg, Community Corrections Manager David Dwyer has informed undersigned counsel that the re-designation is to the federal prison camp.

contends that the policy change violates his constitutional and statutory rights and frustrates the Court's clearly stated intent, which relied upon then-existing BOP policy of long standing. Defendant intends to separately file a motion to correct his sentence, under FED. R. CRIM. P. 36, and a Motion to Vacate his Sentence (for resentencing) under 28 U.S.C. § 2255. The proposed stay, filed herewith, is intended to maintain the status quo in order to give the Court an opportunity to hold a hearing and/or receive relevant pleadings. *See* Preliminary Order (Jan. 10, 2003). *Frank Iacoboni v. United States*. Civil Action No. 03-30005-MAP, attached hereto as Exhibit D, at 2. Absent a stay, Mr. Doe will be required to move to a federal prison in Pennsylvania. Under BOP policy, he will be eligible to return to the halfway house a month later. It is unclear whether BOP will be able to re-classify him again in such short order. In any event, the transfer to Lewisburg would frustrate the Court's clearly expressed intent and disrupt Mr. Doe's re-entry into the community.

STATEMENT OF FACT

On September 9, 2002, this Court sentenced Mr. Doe to a sentence of 48 months imprisonment. The Court recommended that Mr. Doe serve the sentence in a halfway house. At the time, he had spent 1035 days (or nearly three years) in custody as a result of a detention order entered in the case. *See* Computation

Data (attached hereto as Exhibit E)². Thus, the judgment in effect recommended that he serve the remaining months of his sentence in a halfway house.

On November 5, 2002, Mr. Doe arrived at Coolidge House. From that date through the present, he has not been subject to any disciplinary sanctions. Resident Progress Report, attached hereto as Exhibit F. His only infraction of the house rules has been being five minutes late in returning to the house on a lone occasion. Mr. Doe obtained employment at a local area cab company. His employer describes him as a "valued employee." Letter from Mr. Doe's employer attached hereto as Exhibit G.

The case manager at Coolidge House, described Mr. Doe as a "very agreeable resident, who is respectful in his interactions with staff and other residents." He is currently fulfilling all applicable program requirements at Coolidge House. *See* Exhibit F.

Despite this track record, Mr. Doe has been notified that due to a change in BOP policy, he is to report to a federal prison on January 27. According to his computation, he would be eligible for home confinement on February 24. *See* Exhibit E, 18 U.S.C. § 3624(c).

² The judgment erroneously indicates that Mr. Doe was to self-report. In fact, as indicated in the computation sheet, he was in the Marshal's custody at the time that he was sentenced and delivered to Coolidge House by the Marshals.

ARGUMENT

At the time that this Court imposed its sentence, the stated policy of the Bureau of Prisons permitted defendants with one year or less to be designated to a Community Corrections Center, especially when the Court has recommended such designation. *See* BOP Program Statement 5100, Chapter 4 (attached hereto as Exhibit H)³. This policy had been in effect at least 20 years. *See* New York Times, December 24, 2002, attached hereto as Exhibit I (quoting BOP spokesman). This Court reasonably relied upon this policy statement, which BOP followed in adopting the Court's recommendation. While undersigned counsel was not present at sentencing and has not yet obtained a copy of the transcript, she understands from Mr. Doe's previous attorney that the government did not object to the Court's recommendation at the time of the sentencing hearing.

To transfer Mr. Doe to a Pennsylvania prison, after he has taken substantial steps to re-enter society, would frustrate this Court's intentions, be contrary to sound principles of rehabilitation and punishment, and cause irreparable harm to Mr. Doe.

Defendant submits that BOP should be estoppel from re-classifying Mr. Doe, where this Court reasonably relied upon BOP policies in effect at the

³ Defendant notes that this policy still appears on the BOP's website. *See* www.bop.gov.

time of his sentencing. Defendant furthermore submits that the policy change is founded upon a misinterpretation of the relevant legal provisions.

For the foregoing reasons, defendant respectfully moves that this Court issue the proposed order, filed contemporaneously with this motion, staying Mr. Doe's transfer and setting a schedule for briefing of the relevant issues.

Dated this ____ day of _____, 2003.

JOHN DOE,
By his attorney,

Attorney name
address, phone

CERTIFICATE OF SERVICE

I, Attorney, hereby certify that a true copy of the above-document were served upon (Name of AUSA) attorney for government, BOP Community Corrections Manager on _____, 2003.