



# SENTENCING

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RDAP is available for all security levels except high security inmates at the federal penitentiaries.<sup>2</sup> RDAP studies that have evaluated the program found that it benefits society by reducing recidivism, institutional misconduct, and relapse.<sup>3</sup>

## High Demand for RDAP

Because of the ability to earn up to 12 months of sentence reduction and a six-month transitional halfway house or home confinement<sup>4</sup> placement at the end of a sentence, RDAP has, understandably, been in high demand. Accordingly, in March 2009, the Bureau of Prisons implemented significant policy changes concerning the program.<sup>5</sup> In addition to fleshing out and expanding the scope of the drug treatment programs, the policy imposes some significant revisions. Such changes include the creation of nonresidential drug abuse programs in all facilities with incentives for successful completion and changes in the residential (RDAP) program.

The Non-Residential Drug Abuse Program (NR DAP) is designed for inmates who are awaiting RDAP; inmates who do not meet RDAP qualifications but wish to benefit from drug abuse treatment; those referred by BOP psychology staff; offenders with judicial recommendations for drug treatment but either decline or are not qualified for RDAP; inmates who have detoxified upon entering the Bureau of Prisons; and inmates who are found guilty of an incident report for alcohol or drug use. NR DAP is 12 to 24 weeks in duration. Successful completion of the NR DAP is rewarded by a significant incentive of possible maximum prerelease time in a Residential Reentry Center (RRC), more commonly known as a halfway house. Inmates who successfully complete NR DAP can often receive six months of halfway house placement while similarly situated defendants who have not completed the program will likely receive significantly less.

The changes for the in-demand RDAP program include the type of documentation the Bureau needs in order to consider an offender for RDAP and how,

if such documentation is initially lacking from an offender's file, the offender can document substance abuse history. Prior to the recent change, BOP officials looked for verification of an inmate's substance abuse problem primarily by reviewing the substance abuse section of the Presentence Investigation Report. Now an offender can seek documentation verifying a substance abuse problem from such sources as a former treatment provider or a former parole or probation officer. Moreover, after entering prison, the offender can have BOP medical staff verify physical evidence of addiction such as track marks or detoxification.

Ultimately, in evaluating eligibility for RDAP, there must be a clinical determination by the BOP of a substance abuse diagnosis in accordance with the American Psychiatric Association's Diagnostic and Statistical Manual. This, of course, means that a substance abuse or dependency disorder may not necessarily be diagnosed by a BOP practitioner even if there is documentation in the inmate's file (i.e., Presentence Report) of a substance abuse problem or history. The clinical interview for otherwise RDAP-eligible inmates is to be conducted "ordinarily no less than 24 months from release." Such a time frame is a significant factor. Why? With the high demand for RDAP resulting in full classes and new classes usually starting only every 2-3 months, even with a court recommendation for RDAP, there is a possibility (if not

## Changes to the BOP Residential Drug Abuse Program

In 1989, the Bureau of Prisons (BOP) implemented its first Residential Drug Abuse pilot program. Under it, an inmate who completed the then 12-month program received no incentive by way of reduction in sentence. That changed with the passage of the 1994 Violent Crime Control and Law Enforcement Act. This important legislation mandated a number of changes, the most significant of which authorized the BOP to provide up to a one-year sentence reduction for nonviolent inmates who successfully completed the program now called the 500-Hour Comprehensive Drug and Alcohol Program (RDAP).<sup>1</sup> The new act also required the BOP to provide residential drug abuse treatment for all inmates who were "eligible." In May 1995 the BOP revised its policy in accordance with the Act to require a verifiable documented drug, alcohol, or prescription abuse problem before an inmate could be admitted to the program.

**The following categories of inmates are not eligible for the RDAP program:**

- ❖ **INS detainees;**
- ❖ **Pretrial inmates; and**
- ❖ **Contractual boarders (such as District of Columbia, state, or military inmates).**

likelihood) that an offender sentenced to 24 months or less may not be sent to an institution that provides RDAP.

## Completion Incentives

Completion incentives include early release under 18 U.S.C. § 3621(e) as well as consideration for maximum time in a prerelease community-based treatment program to include home confinement. For low and medium security inmates who may be in RDAP institutions far from home and have more time remaining on their terms before prerelease placement in a Residential Re-entry Center, another completion incentive is consideration for transfer closer to their homes. This is significant because the new policy clearly provides that an offender can be sent to *any* suitable institution for RDAP without regard for where the offender's home is, based on program space availability.

Early release under 18 U.S.C. § 3621(e) for successful completion of RDAP remains the biggest incentive, of course, but has been *significantly changed* by Program Statement (P.S.) 5331-02. Whereas offenders who previously completed RDAP and were otherwise eligible for early release were eligible for a sentence reduction of up to 12 months, this new policy substantially reduces the eligibility timeframe for some offenders. Specifically, only those eligible inmates serving 37 months or more will now be eligible for up to a 12-month early release. Offenders serving 31-36 months will be eligible for only up to a nine-month sentence reduction, and those serving less than 31 months will be eligible for no more than a six-month sentence reduction.

The authority in determining some eligibility factors for early release (for example, whether prior offenses or the current offense might preclude early release) has shifted from the BOP institutions and regional offices to the Designation and Sentence Computation Center (DSCC) in Texas. It is noteworthy that, for the first time, certain sex offenders (those convicted of receipt and/or possession of child pornography) are not automatically disqualified from early release eligibility.<sup>6</sup>

## Not Eligible for Early Release

Inmates not eligible for early release include those who have a prior felony or misdemeanor conviction for homicide,

forcible rape, robbery, aggravated assault, or child sexual abuse. Also not eligible for early release are inmates whose current offense is a felony that: (1) has as an element the actual, attempted, or threatened use of physical force against the person or property of another, (2) involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives, (3) by its nature or conduct presents a serious potential risk of physical force against the person or property of another, or (4) by its nature or conduct involves sexual abuse offenses actually committed upon or intended to be committed upon children. Inmates with firearm convictions and inmates who have received a two-level adjustment in their drug guideline offense severity score for possession of a dangerous weapon (including a firearm) pursuant to Section 2D1.1(b)(1) of the U.S. Sentencing Guides are also ineligible for early release.<sup>7</sup>

## Conclusion

It will now be easier for an inmate whose Presentence Investigative Report fails to document substance abuse to be admitted into the drug and alcohol program. Offenders convicted of child pornography offenses previously precluded from early release will now be eligible to receive it. Moreover, the amount of early release has been quantified dependent upon the actual sentence imposed. Finally, even those inmates who are not eligible for the RDAP program, but who successfully complete a nonresidential program, can receive more halfway house placement than they otherwise would have received.

## Notes

1. 18 U.S.C. § 3621(e)(2)(B).
2. For a list of facilities that offer the program, go to the BOP Web site (<http://www.bop.gov>).
3. Alan Ellis, J. Michael Henderson & James H. Feldman Jr., *Reducing Recidivism: The Bureau of Prisons Comprehensive Residential Drug Abuse Program*, THE CHAMPION, July 2006 at 36.
4. When inmates are 90 percent of the way to their § 3521(e) release date (full sentence less good conduct time less reduction for successful completion of the RDAP in- and out-patient program), they are eligible for referral to home confinement.
5. BOP Program Statements (P.S.) 5331-02 and 5330.11. All Program Statements mentioned in this article can be found at the Bureau's Web site (<http://www.bop.gov>).
6. See P.S. 5162.05 (Categorization of

Offenses).

7. On August 25, 2009, the U.S. Court of Appeals for the Ninth Circuit declared that the BOP's policy to use an inmate's criminal history to deny early release was invalid. The court held that the BOP had provided no insight into its rationale for making certain specified categories of inmates with violent criminal histories ineligible for early release. *Crickon v. Thomas*, — F.3d — (No. 08-35250, 9th Cir. Aug. 25, 2009). The court held that § 3621(e)(2)(B) distinguishes only between inmates currently serving sentences for violent versus nonviolent offenses; it does not address inmates' prior convictions. Previously in *Arrington v. Daniels*, 516 F.3d 1106, 1113 (9th Cir. 2008), the same court of appeals held that there was no valid rationale explaining the Bureau's decision to categorically exclude prisoners with current convictions involving firearms from eligibility for early release. Therefore, that rule was similarly invalid with respect to that categorical exclusion. Both cases were decided under the Administrative Procedure Act. ■

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