

Chapter 3

RESIDENTIAL DRUG ABUSE PROGRAM (RDAP)

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§3:10 INTRODUCTION

The Federal Bureau of Prisons (BOP) estimates that 40 percent of federal inmates have diagnosable, moderate-to-severe substance abuse problems. See Stmt. of BOP National Drug Abuse Coordinator Beth Weinman at the U.S. Sentencing Commission's Symposium of Alternatives to Incarceration, *Prison Programs Resulting in Reduced Sentences* (July 14, 2008) (available at www.ussc.gov/Research/Research_Projects/Alternatives/20080714_Alternatives/05_FINAL_PrisonPrograms.pdf). Some form of drug treatment is *mandatory* where drug use contributed to the commission of the offense, where it was the basis for revocation of supervised release or community placement, or where the sentencing court so recommends. Sanctions for failure to complete mandated treatment include pay reduction and community program ineligibility.

The BOP operates three drug abuse programs, the administration of which is governed by 28 C.F.R. §550.10, *et. seq.* and, in turn, BOP Program Statement 5330.11, *Psychology Treatment Programs* (March 16, 2009). The first program is the 12-15 hour voluntary Drug Abuse Education Course offered at all institutions, designed to teach inmates about the consequences of drug/alcohol abuse and addiction by reviewing their personal drug use and the cycle of drug use and crime. The second program is the 12-24 week (90-120 minutes per week) Non-Residential Drug Abuse Treatment (NR DAP), which is targeted to, *inter alia*, those awaiting RDAP, those who do not meet RDAP admission criteria, and those found guilty of an incident report for use of drugs or alcohol. In addition to paying NR DAP graduates \$30, BOP policy encourages wardens to consider them for maximum pre-release (halfway house and/or home confinement) placement. The third program is the nine-plus month, 500-hour Residential Drug Abuse Treatment Program (RDAP) for inmates with a diagnosable and verifiable substance abuse disorder.

§3:20 WHAT IS RDAP?

Through the Violent Crime Control and Law Enforcement Act of 1994, Congress directed that the BOP “provide residential substance abuse treatment ... for all eligible prisoners,” defining “eligible prisoner” as one the BOP determines has “a substance abuse problem” and is “willing to participate in a residential substance abuse treatment program.” 18 U.S.C. §§3621(e)(1)(C), (e)(5)(B). The BOP’s “inpatient” 500-hour residential drug abuse program, in existence since 1989, employs Cognitive Behavioral Therapy (CBT) to treat substance abuse. The “inpatient” component is followed by an aftercare component, which is administered in the community during the final six months of an inmate’s sentence.

Experience shows that parties to the federal criminal justice system (courts, probation officers, prosecutors) favor RDAP because it is one of the few avenues for mental health treatment available to inmates not suffering from acute psychological problems. This, in turn, reduces substantially the risk of recidivism and of substance abuse relapse. See Pelissier, et al., *Triad Drug Treatment Evaluation*, 65 Federal Probation 3, 6 (Dec. 2001). Male inmates who successfully complete RDAP are 16 percent less likely to be re-arrested or revoked than cohorts who went untreated, and male RDAP graduates are 15 percent less likely to use drugs. Female graduates are 18 percent less likely to re-offend or use drugs. *Id.*

Through the 1994 Crime Bill, Congress also incentivized RDAP participation: those *nonviolent* offenders who successfully complete the program while incarcerated (and who have not previously received early release via RDAP) are eligible for release up to one year prior to the expiration of sentence. 18 U.S.C. §3621(e). Importantly, prisoners ineligible for a reduction in sentence under §3621(e) are not precluded from participating in RDAP; the two are not mutually exclusive.

Congress’s action had its desired result, especially since RDAP is the only BOP program through which federal prisoners can earn a sentence reduction. An increasing number of inmates seek admission into RDAP annually, with more than 17,000 participating in 2008. See Weinman Stmt., *supra* (approximately 7,000 inmates on waiting list). Since 2009, BOP has employed a sliding scale for §3621(e) reductions tied to sentence length, meaning that not all RDAP participants qualify for the full year reduction in sentence.

§3:30 ADMISSION TO RDAP

RDAP participation is voluntary. Interested prisoners within 36 months of release may apply by requesting an eligibility interview via a “cop-out” (informal request from a staff member) or a BP-8 (formal request for resolution). The written request serves to initiate the RDAP application and should prompt an interview with either the institution’s RDAP Coordinator or a drug treatment specialist (DTS), or, if a prisoner is housed at a facility that does not offer the RDAP, a member of the Psychology Services staff.

To qualify for RDAP, one must, *inter alia*, have at least 24 months or more remaining to serve; present a verifiable, documented pattern of substance abuse or dependence within the 12-month period preceding arrest on the underlying offense; have no serious mental or cognitive impairment precluding full program participation; be halfway house eligible (which precludes participation by removable non-U.S. citizens); and sign acknowledgment of program responsibilities.

§3:30.1 Diagnosable Disorder

Section 3621 is silent with respect to how determinations about whether a prisoner has “a substance abuse problem” are made. And, while 28 C.F.R. §550.53(b) establishes criteria, in practice Program Statement 5330.11 controls. Staff reviews each program applicant’s PSR before scheduling an interview

to ascertain whether the applicant meets the diagnostic criteria for abuse or dependence indicated in the *Diagnostic and Statistical Manual of the Mental Disorders, Fourth Edition, (DSM-IV)*. An RDAP applicant's chemical dependency need not be linked to his offense conduct, nor is a judicial recommendation necessary. There is, however, debate over how much drug or alcohol use is enough. *Compare* P.S. 5330.11 §2.5.8(2)-NOTE ("recreational, social, or occasional use of alcohol and/or other drugs that does not rise to the level of excessive or abusive drinking does not provide the required verification of a substance abuse disorder") *with Kuna v. Daniels*, 234 F.Supp.2d 1168 (D. Or. 2002) (social use of alcohol sufficient to warrant RDAP admission).

In terms of assessing a prisoner's substance abuse history, the BOP places primary reliance on a prisoner's self-reporting to the Presentence Investigation Report (PSR) writer. Whatever is written in the PSR is presumptively valid, and any claim of a disorder that the PSR does not plainly substantiate is treated as suspect. Counsel must, therefore, be attuned to a client's substance abuse history. Counsel should meet with the client before the presentence interview to fully understand the nature and extent of the client's problem(s) (e.g., illegal drugs, prescribed pharmaceuticals, alcohol, etc.). Prudence also dictates that counsel encourage clients to be fully forthcoming with the PSR writer, that is, not to minimize for fear of embarrassment. Subject to client pre-approval, counsel can foster this conversation by offering the PSR writer an overview during the interview, allowing the writer to follow-up directly with the client as deemed appropriate. Counsel can also provide documentation (e.g., medical records and clinical assessments) from an independent professional (e.g., physician, mental health professional, drug and alcohol counselor) concerning the existence and degree of a client's dependence. Barring that, it is useful to find records that demonstrate the nature and extent of the client's substance abuse difficulties, such as certified copies of DUI judgments, hospital records noting blood alcohol level, and/or a primary physician's treatment notes with entries that substantiate the existence of the problem. If circumstances interfere with or prevent client candor during the PSR interview, counsel should refer clients to qualified independent providers for assessment and treatment as soon as practicable.

Given the §3621(e) incentive, and to ferret out malingering, RDAP eligibility interviews often entail difficult questions designed to determine whether admission is sought in good faith to obtain treatment, or simply to secure a quicker return home. Applicants are routinely asked when they learned about the program and the §3621(e) credit, whether attorneys advised them to exaggerate treatment needs when meeting with probation, and the details of their drug or alcohol use (e.g., when, how often, where, with whom, others' awareness, etc.). Counsel should thus advise clients not to mangle or to overstate their problems, either during the presentence interview or when seeking entrance into the program.

Should the BOP deem a PSR factually insufficient, an inmate might well be refused an interview or found ineligible for services. In that instance, counsel and/or the client may supply "collateral documentation." As set forth in P.S. 5330.11, this "requires documentation from a substance abuse treatment provider or medical provider who diagnosed and treated the inmate for a substance abuse disorder within the 12-month period before the inmate's arrest on his or her current offense." (Emphasis added). This documentation must be sent to and received by the drug abuse treatment staff in the Bureau of Prisons institution. It is not to be sent through the inmate for him or her to provide to the drug abuse treatment staff. If the document is acceptable, the inmate will be referred to the Drug Abuse Program Coordinator for a diagnostic interview.

Multiple convictions (two or more) for Driving Under the Influence (DUI) or Driving While Intoxicated (DWI) in the five years prior to his or her most recent arrest will suffice to show eligibility for the RDAP program.

§3:30.2 The 12-Month Rule

Although unstated in P.S. 5330.11, the so-called “12-month rule” derives from the BOP’s disputed interpretation of “sustained remission,” as provided for in the DSM. See Weinman Stmt., *supra*, at 83–84 (2008) (“[W]e use the [DSM], and that’s where all the information is regarding what we call court specifiers. Sustained remission is that you have not used drugs for over a year.... Because that’s the standard in the [DSM] and that’s what we follow.”). Thus, no matter the nature or extent of a prisoner’s substance abuse problems, if the BOP cannot verify that the individual used to a level rising to the level of a DSM diagnosis in the year prior to arrest, RDAP is denied. Neither statute nor controlling Code of Federal Regulations provisions provide for the 12-month rule. Furthermore, courts have found that the “DSM-IV does not require documentation of substance abuse or dependency during the 12-month period *immediately preceding either a diagnostic interview, arrest, or incarceration.*” *Mitchell v. Andrews*, 235 F. Supp. 2d 1085, 1090 (E.D. Cal. 2001) (emphasis in original); see *Smith v. Vazquez*, 491 F. Supp. 2d 1165 (S.D. Ga. 2007). A simple hypothetical highlights the unsustainability of the artificial 12-month rule construct. Inmate A was abusing alcohol following his arrest and up to his sentencing in order to self-medicate for the stress he was encountering. Prior to his arrest, he did not have an alcohol abuse problem. He is not eligible for the program. On the other hand, an inmate who was abusing alcohol within one year prior to his arrest and who upon his arrest stopped using alcohol, is still eligible for the program, even though sentencing was delayed by years.

§3:30.3 The 24-Month Cutoff

As noted, Congress requires that the BOP provide residential substance abuse treatment for each inmate determined to have a substance abuse problem. Moreover, Congress intends that the BOP administer RDAP so as to maximize each eligible inmate’s sentence reduction. See *Conf. Rep. to Consolidated Appropriations Act of 2010*, 155 CONG. REC. H13631-03, at H13887 (daily ed. Dec. 8, 2009), Pub. L. No. 111-117, 123 Stat. 3034 (Dec. 16, 2009). However, “[Fiscal Year] 2007 was the first year that the Bureau was unable to meet its mandate to provide treatment for all inmates who volunteer for and are qualified for treatment before they are released from the Bureau of Prisons.” Wienman Stmt., *supra*, at 72. Soon thereafter, BOP eliminated its handful of RDAPs for Spanish-speaking prisoners; in order to participate in the program, a prisoner must now be able to speak and understand English. Through Program Statement 5330.11, promulgated in 2009, the BOP also implemented the 24-month cutoff. BOP then reported compliance with its mandate to Congress. See USDOJ-BOP, *The Federal Bureau of Prisons Annual Report on Substance Abuse Treatment Programs Fiscal Year 2010*, at 9 (Dec. 2010) (“In FY 2010, the BOP met the requirement [of the VCCLEA] to treat 100 percent of the eligible prisoner population....”).

Program Statement 5330.11 directs that otherwise eligible prisoners must “ordinarily” be within 24 months of release to qualify for admittance to RDAP. There is no known basis for this 24-month cutoff date, which is troubling since, *inter alia*, the program can be completed in as little as 15 months. See *Scott v. FCI Fairton*, 407 Fed. Appx. 612 (3rd Cir. 2011) (citing BOP submissions). Accounting for customary good time credits, the 24-month cutoff means that a defendant with a diagnosable disorder and no pretrial jail credit must receive a sentence of 27.6 months or greater to even be considered for the program. Notably, BOP officials have stated publicly that the 24-month cutoff has shifted to 27 months, which means a sentence of at least 31 months (if the prisoner is ineligible for pretrial jail credit).

Like the 12-month rule, the 24-month cutoff, which is inconsistent with the agency’s historic administration of RDAP, is properly seen as arbitrary, capricious, and not meriting *Chevron* deference. Similarly, for those in custody, the

rule can be challenged by way of a habeas corpus §2241 petition.

§3:30.4 Ineligibility

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

- (1) Immigration and Customs Enforcement detainees;
- (2) Pretrial inmates;
- (3) Contractual boarders (for example, State or military inmates);
- (4) Inmates with detainers that preclude halfway house placement.

§3:40 THE PROGRAM

Once deemed RDAP-eligible, a prisoner is placed on a wait list that is ordered by projected release date (*i.e.*, time remaining to serve, accounting for anticipated good time credit). If housed at an institution that does not offer RDAP, a prisoner will be transferred to one of the 74 programs (64 male, 10 female) at or around the time of expected entrance into a treatment class. There is a potential that prisoner movement may delay RDAP admission. RDAP-eligible inmates at an institution offering the program are routinely bumped from a class at the last minute when new prisoners arrive with less time remaining to serve. Displacement from a class, which is generally 24-to-27 persons in size, can postpone program participation for several months. RDAP has two distinct components that must both be completed: the 500-hour “in custody” treatment phase, and the Community Transitional Drug Abuse Treatment Program (TDAT) phase for halfway houses and home confinement. The residential phase is designed for participants to reconcile their individual substance abuse issues. To this end, they are placed in a segregated housing unit, and institutional assignments (work/school) become part-time and secondary to treatment, recovery and reentry preparation. RDAP participants attend both of the daily 3.5-hour classes, which include course workbooks, homework, and regular group therapy sessions. “The remainder of the day is spent in education, work skills training, and/or other inmate programming.” USDOJ-BOP, *State of the Bureau 2009*, at 25.

“RDAP follows the CBT model of treatment wrapped into a modified therapeutic community model where inmates learn what it is like living in a prosocial community.” *Id.* Counseling strategies are intended to compel inmates “to identify, confront, and alter the attitudes, values, and thinking patterns that lead to criminal and drug-using behavior.” *Triad Drug Treatment Evaluation*, 65 Federal Probation at 3. “Upon completion of this portion of the treatment which lasts nine months, aftercare services are provided to the inmate while he/she is in the general population of the prison, and later at the residential reentry center (RRC).” *State of the Bureau 2009*, at 25. Because the community corrections component of the program is mandatory, prisoners ineligible for hallway house placement (*e.g.*, removable aliens, individuals with serious medical or mental illness) are ineligible for RDAP.

Anecdotal evidence suggests that approximately one-third of RDAP participants fail to complete the program. Tardiness, incomplete assignments and institutional rules violations can all result in expulsion from the program and the loss of any anticipated time credit. Those who reach TDAT are expected to work and prepare for reentry while being subject to added conditions, like group counseling, random urinalysis and a lower violation threshold than other halfway house residents. These demands continue throughout the period of pre-release confinement, including home confinement. As at the institution, a rules violation can result in loss of §3621(e) credit, as well as transfer back to a prisoner’s parent institution for the remaining sentence.

§3:50 THE SENTENCE REDUCTION

The determination as to whether an inmate is ineligible for early release has been the subject of significant controversy. After much litigation, the BOP modified the criteria for eligibility for early release from a sentence for successful completion of RDAP. See 28 C.F.R. §550.58; Program Statement 5331.02, *Early Release Procedures Under 18 U.S.C. §3621(e)* (3/16/2009); and Program Statement 5162.05, *Categorization of Offenses* (3/16/2009). This change was intended to exclude violent offenders by the exercise of the implicit discretion placed in BOP by the statute, 18 U.S.C. §3621(e)(2)(B), rather than by definition of the statutory language “nonviolent offense.” The authority for determining whether prior offense history or current offense characteristics preclude §3621(e) credit has been moved to the BOP’s Designation and Sentence Computation Center (DSCC) in Grand Prairie, Texas.

Bureau policy, which the Supreme Court has upheld, denies early release to persons who have been convicted of a crime of violence—homicide, forcible rape, robbery, aggravated assault, child sexual offense (but *not* possession of child pornography), arson or kidnapping—or a felony offense (1) that has as an element, the actual, attempted, or threatened use of physical force against the person or property of another; (2) that involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives (including any explosive material or explosive device); (3) that by its nature or conduct, presents a serious potential risk of physical force against the person or property of another; or (4) that by its nature or conduct involves sexual abuse offenses committed upon children. *Lopez v. Davis*, 531 U.S. 227 (2001); *but cf. Paulsen v. Daniels*, 413 F.3d 999 (9th Cir. 2005) (program statement violated the Administrative Procedures Act). 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 Guideline Section 2D1.1(b)(1) are also ineligible for early release. For information on the specific crimes that would preclude an inmate from an early release, see Program Statement §5162.04.

§3:50.1 Ineligibility

Inmates who have a prior felony or misdemeanor conviction for:

- Homicide (including deaths caused by recklessness, but not including deaths caused by negligence or justifiable homicide);
- Forcible rape;
- Robbery;
- Aggravated assault;
- Arson;
- Kidnapping; or
- An offense that by its nature or conduct involves sexual abuse offenses committed upon minors.

Inmates who have a current felony conviction for:

- An offense that has as an element, the actual, attempted, or threatened use of physical force against the person or property of another;
- An offense that involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives (including any explosive material or explosive device);
- An offense that, by its nature or conduct, presents a serious potential risk of physical force against the person or property of another; or
- An offense that, by its nature or conduct, involves sexual abuse offense committed upon minors;
- Inmates who have been convicted of an attempt, conspiracy, or other offense which involved an underlying offense listed in paragraph (b)(4)

and/or (b)(5) of this section; or

- Inmates who previously received an early release under 18 U.S.C. §3621.

§3:50.2 Amount of Reduction

The Bureau has implemented a sliding scale for the amount of a sentence reduction: those serving 30 months or less are ineligible for more than a sixmonth reduction; those serving 31-36 months are ineligible for more than a nine-month reduction; and those serving 37 months or longer are eligible for the full 12 months. See P.S. 5331.02 §10. Additionally, certain sex offenders, in particular individuals convicted of possession of child pornography, are not automatically disqualified from §3621(e) eligibility.

§3:60 RESIDENTIAL DRUG ABUSE PROGRAM LOCATIONS

The Residential Drug Abuse Program (RDAP) is available at the following facilities:

NORTHEAST REGION

FCI Allenwood – Low (PA)
FCI Allenwood – Med (PA)
FCI Berlin (NH)
USP Canaan (PA)
FCI Danbury (CT)*
FCI Elkton (OH)
FCI Fairton (NJ)
FCI Fort Dix 1 (NJ)
FCI Fort Dix 2 (NJ)
FPC Lewisburg (PA)
FPC McKean (PA)
FCI Schuylkill (PA)

NORTH CENTRAL REGION

FPC Duluth (MN)
FCI Englewood (CO)
FPC Florence (CO)
FCI Florence (CO)
FPC Greenville (IL)*
FPC Leavenworth (KS)
USP Leavenworth (KS)
FCI Milan (MI)
USP Marion (IL)
FCI Oxford (WI)
FPC Pekin (IL)
FCI Sandstone (MN)
USMCFP Springfield (MO)
FCI Terre Haute (IN)
FCI Waseca (MN)*
FPC Yankton (SD)

SOUTHEAST REGION

FCI Coleman (FL)
USP Coleman II (FL)
FPC Edgefield (SC)
FCI Jesup (GA)
FCI Marianna (FL)

FPC Miami (FL)
FPC Montgomery (AL)
FPC Pensacola (FL)
FCI Talladega (AL)
FCI Tallahassee (FL)*
FCI Yazoo City (MS)

MID-ATLANTIC REGION

FPC Alderson (WV)*
FPC Beckley (WV)
FCI Beckley (WV)
USP Big Sandy (KY)
FCI Butner (NC)
FPC Cumberland (MD)
FCI Cumberland (MD)
SFF Hazelton (WV)*
FCI Morgantown (WV)
FMC Lexington (KY)
FMC Lexington (KY)□
FCI Petersburg – Low (VA)
FCI Petersburg – Med (VA)
FCI Memphis (TN)

SOUTH CENTRAL REGION

FCI Bastrop (TX)
FPC Beaumont (TX)
FCI Beaumont – Med (TX)
FCI Beaumont – Low (TX)
USP Beaumont (TX)
FPC Bryan (TX)*
FMC Carswell (TX)*
FCI El Reno (OK)
FCI Forrest City - Low (AK)
FCI Forrest City - Med (AK)
FCI Fort Worth (TX)
FCI La Tuna (TX)
FCI Seagoville (TX)
FPC Texarkana (TX)

WESTERN REGION

FCI Dublin (CA)*
FPC Dublin (CA)*
FCI Herlong (CA)
FPC Lompoc (CA)
FPC Phoenix (AZ)*
FCI Phoenix (AZ)
FCI Safford (AZ)
FPC Sheridan (OR)
FCI Sheridan (OR)
FCI Terminal Island (CA)
FCI Terminal Island (CA)

CONTRACT FACILITY

RCI Rivers (NC)

KEY

FCI = Federal Correctional Institution
FMC = Federal Medical Center
FPC = Federal Prison Camp
FSL = Federal Satellite Low
MCFP = Medical Center for Federal
Prisoners
USP = United States Penitentiary
RCI = Rivers Correctional Institution
* = Female Facility

ENDNOTES

- This chapter derives, in part, from: A. Ellis and T. Bussert, *Looking at the BOP's Amended RDAP Rules*, *Criminal Justice* (ABA Fall 2011); T. Bussert and H. Martin, *The Federal Bureau of Prisons in Defending a Federal Criminal Case* (Sarah Gannett, ed.) (Federal Defenders of San Diego, Inc. 2010); and T. Bussert and J. Sickler, *BOP Update: More Beds, Less Rehabilitation*, *the Champion* (NACDL March 2005).
- All BOP program statements mentioned in this article can be found on the Bureau's website, www.bop.gov.