

Association Of Federal Defense Attorneys (AFDA)
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Online Seminar on BOP's Halfway House Placement Policy

September 2004

AFDA's Online Seminar

The Federal Bureau of Prisons' Policy On Halfway House Placement

AFDA web site: www.afda.org (Since 1995)

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BEFORE WE BEGIN, SOME INTRODUCTORY COMMENTS:

I welcome all of you to our online seminar, and I thank you for taking the time to be here.

A special welcome to those of you attending an AFDA online seminar for the first time.

If this is your first online seminar, please note that all online seminars are free to AFDA members. It's all included in your membership fee. If you are attending as a guest, welcome aboard.

Online seminars will be presented once (sometimes twice) per month.

Today's program will last approx 45 minutes.

The online seminar feature of the AFDA web site operates like a chat room, but it has moderator controls which allow presentations to be conducted without interruptions, and also permit question/answer sessions to be managed in an orderly fashion.

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If you wish to communicate with me, you can write a message in the white box at the bottom section of the section of the screen, then click where it says "Click Here To Post Your Comments / Questions." You can also Instant Message one another by putting your mouse on the person's name so it's highlighted, then double-clicking. This allows attendees to have private conversations with each other during the presentation.

The format will be the presentation of a series of slides posted in this window.

Several slides contain hypertext links to case opinions (and in one slide, a link to a sentencing guideline provision). I recommend that you copy / paste the link to a case opinion into a separate browser (eg, open up another Internet Explorer and paste the link into the browser to access the case). This way, the window on your screen for the online seminar is not interrupted.

When you see a case cited in a slide, click the case name. This will activate Acrobat Reader in your hard drive, and the case opinion will appear on your screen. You can save it to your hard drive, so that by the time we are done today, you will have a collection of all the cases from today's program.

IMPORTANT: after you have finished saving the case to your hard drive in Acrobat Reader, hit the **BACK** button in the Reader window to return to this seminar.

Some additional points to cover at the outset:

TRANSCRIPT

You can save a transcript of today's program by clicking the **GET TRANSCRIPT** button in the lower right hand corner of your screen. At the completion of the program, click that bar, and a box will appear on your screen prompting you to designate a directory in which to save the file. The transcript file will be saved in HTML format. Wordperfect (and probably Word as well) easily reads HTML files.

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You can receive by email a Certificate of Attendance by following instructions at the end of the program.

THIS ONLINE PROGRAM CAN ALSO BE PURCHASED

An audio file of this online seminar, plus the slide presentation, and all of the linked cases, can be purchased as a set online on the AFDA web site. It will be ready in about a week's time. Click the Audios / Outlines link on the home page. The audio file / slides / cases will all be downloadable into your hard drive as a single file. The fee is nominal and helps AFDA offset operating expenses.

WE ARE NOW READY TO BEGIN

Let me begin by introducing David Novak, who is online with us.

Since 1997, David has worked closely with the federal defense bar on hundreds of cases, including high-profile defendants, as an advisor in regard to the Federal Bureau of Prisons. He advises defense counsel on BOP policies and practices, including designation issues, and how to develop sentencing strategies based on BOP programs that can result in a reduction of net time served. Dave also works directly with the clients on counseling them to do federal time.

First, I am going to open this online program with an overview of the Halfway House policy and key cases that have interpreted it.

I will then turn it over to Dave with some questions, and then I will open it up to the floor for everyone to participate. Dave will be pleased to dialogue with you in response to any questions you may wish to run by him.

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It all began in December 2002, when the BOP issued its now-infamous memo dated December 20, 2002, by then-director Kathleen Hawk-Sawyer, in which the agency shifted gears and explicitly decided to no longer honor judicial recommendations for halfway house placement for those defendants sentenced to terms of imprisonment.

The memo states in part:

The Bureau will not use CCCs as a substitute for imprisonment.

Please open up another web browser and paste the following web address to access the BOP memo:

http://www.afda.org/afda/online_BOPseminar/HawkMemo_CCC.pdf

The memo rationalizes the shift in policy as follows:

This procedure change follows recent guidance from the U.S. Department of Justice's Office of Legal Counsel (OLC), finding that the term, "community confinement" is not synonymous with "imprisonment." OLC has determined that the Bureau's practice of using CCCs as a substitute for imprisonment contravenes well-established caselaw, and is inconsistent with USSG 5C1.1.

The memo also stated that inmates who had been designated to CCCs and who had more than 150 days remaining in their sentences as of December 16, 2002 would be re-designated to prison institutions.

That's the BOP memo of December 2002.

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As noted in the BOP memo, the agency's decision to shift positions was based on a memorandum issued by the Office of Legal Counsel (OLC) on December 13, 2002.

Please open up another web browser and paste the following web address to access the OLC memo:

http://www.afda.org/afda/online_BOPseminar/DOJmemo_Dec2002.pdf

Importantly, the OLC Memorandum set forth the following conclusion, which was ultimately adopted by the BOP:

Your office [i.e., the BOP] has informed us that when a federal offender whom the [BOP] deems to be low-risk and nonviolent receives a short sentence of imprisonment, BOP often places that offender in a community corrections center, halfway house, or other form of "community confinement," rather than in prison. Your office has asked us to advise you whether BOP has general authority, either upon the recommendation of the sentencing judge or otherwise, to place such an offender directly in community confinement at the outset of his sentence or to transfer him from prison to community confinement during the course of his sentence.

We conclude below that the BOP has no such general authority. As we explain, BOP's statutory authority to implement sentences of imprisonment must be construed, wherever possible, to comport with the legal requirements that govern the federal courts' sentencing order. Community confinement does not constitute imprisonment for purposes of a sentencing order, and BOP lacks clear general statutory authority to place in community confinement an offender who has been sentenced to a term of imprisonment. BOP's practice is therefore unlawful.

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This language in the OLC memo, like its counterpart in the BOP memo, dealt specifically with "front-end" placement in a halfway house -- that is, designating a defendant to serve his/her sentence in a halfway house.

The OLC memo also addressed the subject of "back-end" placement in a halfway house -- that is, the BOP's transfer of an inmate to a halfway house from a prison facility to serve the final months of the term of imprisonment.

On this point, the OLC memo concluded that the BOP lacked statutory authority to transfer inmates to CCCs for more than ten percent of their sentences, explaining that "[t]he authority conferred under section 3624(c) to transfer a prisoner to a non-prison site is clearly limited to a period 'not to exceed six months, of the last 10 per centum of the time to be served,' and we see no basis for disregarding this time limitation."

On December 16, 2002, the Deputy Attorney General, Larry Thompson, adopted the OLC memorandum and directed the BOP to implement it, which resulted in the issuance of the BOP's December 20, 2002 memo referenced above.

The BOP's policy enunciated in December 2002 resulted in a flood of lawsuits filed in various district courts nationwide. A number of courts held the policy invalid for a number of reasons. Here are links to certain of those opinions, which you may want to have in your hard drive for reference:

[Please open up another web browser and paste the following web addresses one at a time to access the case opinions. Note that you can hold off on doing this until after the online program has concluded. We will keep the entire presentation up on the screen for about 30 minutes afterwards]:

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http://www.afda.org/afda/online_BOPseminar/Colton_opinion.pdf
Colton v. Ashcroft, 299 F. Supp. 2d 681, 684 (E.D. Ky. 2004)(collecting cases)

http://www.afda.org/afda/online_BOPseminar/Monahan_opinion.pdf
Monahan v. Winn, 276 F.Supp. 2d 196, 207-08, 212 (D. Mass. 2003)

http://www.afda.org/afda/online_BOPseminar/Ferguson_opinion.pdf
Ferguson v. Ashcroft, 248 F. Supp. 2d 547, 572 (M.D. La. 2003)

http://www.afda.org/afda/online_BOPseminar/Iacoboni_opinion.pdf
Iacoboni v. United States, 251 F. Supp. 2d 1015, 1024-29 (D. Mass. 2003)

http://www.afda.org/afda/online_BOPseminar/DiStefano_opinion.pdf
Distefano v. Federal Bureau of Prisons, 2004 U.S. Dist. LEXIS 3190 (S.D.N.Y. Mar. 4, 2004)

http://www.afda.org/afda/online_BOPseminar/Zucker_opinion.pdf
Zucker v. Menifee, No. 2004 U.S. Dist LEXIS 724 (S.D.N.Y. Jan. 21, 2004)

The above links are all to district court opinions.

It wasn't until this month -- September 3, 2004 to be exact -- that any federal appellate court addressed the validity of the BOP policy.

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On September 3, the First Circuit Court of Appeals issued a key ruling in *Goldings v. Winn*, which held that the BOP's "policy is contrary to the plain meaning of 18 U.S.C. § 3621(b)."

Paste the following link into a web browser to access the opinion:

http://www.afda.org/afda/online_BOPseminar/Goldings_opinion.pdf

This opinion specifically addresses "back-end" halfway house placement (the authority of the BOP to transfer an inmate to a halfway house to serve the final part of his prison term):

Basic facts / procedural background in the *Goldings* case:

Defendant *Goldings*, a white collar offender (tax / wire fraud) and former attorney, pled guilty District Court, Massachusetts, in July 2002.

Sentenced to 36 months.

On August 28, 2002, he reported to FMC Devans in Mass.

Because this was prior to the December 13, 2002 memo, the BOP was still following its "old" policy, as noted in the following excerpt from the *Golding* opinion:

When *Goldings* entered federal custody, the BOP considered prisoners for placement in community correction centers near the end of their sentences, for up to six months, pursuant to a longstanding practice. In addition, the BOP had a policy of placing in CCCs some low-risk, non-violent federal offenders who had been sentenced to short periods of imprisonment, including for periods of more than six months, particularly if the sentencing court so recommended.

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Then came the December 20, 2002 memo discussed above, as the result of which the warden at FMC Devans informed inmates of the new policy,

specifically that all future pre-release CCC designations would be limited to the last ten percent of an inmate's prison term.

Goldings then filed a pro se lawsuit in District Court in Mass, challenging the new policy. As stated in the Golding opinion:

His complaint alleged that under the BOP policy in effect at the time of his sentencing, he would have been eligible for transfer to a CCC as early as October 7, 2004, six months before his statutory release date. In contrast, under the new policy, his transfer is not possible until January 7, 2005, when he will have only ten percent of his sentence left to serve.

The district court granted the government's motion to dismiss, and the First Circuit reversed in favor of Golding, holdig as follows:

[W]e hold that 18 U.S.C. §3621(b) authorizes the BOP to transfer Goldings to a CCC at any time during his prison term. The BOP's discretionary authority under § 3621(b) is not subject to the temporal limitations of 18 U.S.C. § 3624(c). We vacate the order of the district court granting the defendants' motion to dismiss and remand for further proceedings consistent with this opinion.

Key analytical points made by the First Circuit in the opinion:

Because the opinion focuses on statutory interpretation, it's worth setting forth the language of the statute at issue here, 18 USC 3624(c):

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(c) Pre-release custody. -- The Bureau of Prisons shall, to the extent practicable, assure that a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last 10 per centum of the term to be served under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for the prisoner's re-entry into the community. The authority provided by this subsection may be used to place a prisoner in home confinement.

The Court read this statute in conjunction with 18 U.S.C. § 3621(b), pursuant to which the BOP "may designate any available penal or correctional facility" as a place of imprisonment and "may at any time . . . direct the transfer of a prisoner from one penal or correctional facility to another." Section 3621(b) provides in relevant part:

The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability The Bureau may at any time . . . direct the transfer of a prisoner from one penal or correctional facility to another. 18 U.S.C. § 3621(b).

Reading §3621(b) and § 3624(c) together, the Court observed that "§3624(c) does not prohibit the BOP from transferring prisoners to a CCC prior to the lesser of six months or ten percent of the end of their prison terms."

Moreover, the Court's ruling in Goldings was based on a recognition that section 3624 does not merely confer discretion on the BOP, but actually obligates the BOP to facilitate the inmate's re-entry into the community. Note the following language from the opinion:

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By its plain language, § 3624(c) provides that the BOP "shall take steps" to "assure" that prisoners serve a reasonable part of the last ten percent of their prison terms "under conditions that afford the prisoner a reasonable opportunity to adjust to and prepare for the prisoner's re-entry into the community."

This language imposes an affirmative obligation on the BOP to take steps to facilitate a smooth re-entry for prisoners into the outside world. It is true that this obligation is qualified. Section 3624(c) does not mandate placement in a CCC prior to release, and it requires the BOP to assure that a prisoner spends the last part of his sentence under pre-release conditions only if practicable. However, a qualified obligation differs from a grant of discretion. Under § 3624(c), the BOP must ensure placement under pre-release conditions except where no such placement is practicable."

Turning its attention to section 3621(b), the Court observed as follows:

There is no language in § 3621(b) that limits the BOP's designation authority to the prisoner's initial place of imprisonment. It expressly provides that "[t]he [BOP] may at any time . . . direct the transfer of a prisoner from one penal or correctional facility to another.

(emphasis added). Thus, on its face, § 3621(b) permits the BOP to direct Goldings' transfer to a CCC prior to the last ten percent of his prison term, unless, as the defendants argue, §3621(b) does not apply to CCC placements at all because a CCC is not a "place of imprisonment."

The Court concluded that a halfway house is indeed a "place of imprisonment"; thus, the BOP had the authority under 3621(b) to transfer Goldings to a halfway house:

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"Under § 3621(b), the BOP has discretionary authority to designate any available penal or correctional facility that meets minimum standards of health and habitability as the place of a prisoner's imprisonment, and to transfer a prisoner at any time to such a facility. A community correction center is a correctional facility and therefore may serve as a prisoner's place of imprisonment."

One final observation on the Goldings case before we move on:

The concurring opinion by Judge Howard cites with approval the US Supreme Court's ruling in *Lopez v. Davis*, 531 U.S. 230, 243-44 (2001), which held that the BOP "has the authority to rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority."

Because the *Goldings* case is from the First Circuit, it is binding on the district courts in Massachusetts, Maine, New Hampshire, Rhode Island, and Puerto Rico.

My own observation:

In reading the *Goldings v Winn* opinion, it strikes me that the same rationale by which the First Circuit held that the BOP has the authority to make "back-end" transfers of an inmate to a halfway house, thus rejecting the OLC memo, would likewise support the view that the BOP also has authority at the "front end" to designate defendants to halfway houses immediately following their sentences. While the only factual circumstance before the First Circuit was the request by *Golding* for a "back-end" transfer, the court's analysis would seem equally applicable to "front-end" designations.

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I'm going to turn to Dave Novak now and invite his input on this key ruling.

Greg_Nicolaysen: Dave, the First Circuit made it clear that the BOP has the AUTHORITY to transfer an inmate to a CCC. But there is a distinction between AUTHORITY, on the one hand, and POLICY, on the other. To what extent do you expect the policy of the agency to change in regard to CCC placement based on a federal circuit's determination that the agency has the authority to transfer an inmate to a CCC at any time during his prison term?

Dave_Novak: Great question. Upon reviewing the referenced opinion I spoke with several BOP designation officials. They were unanimous in their comments. Basically they both stated that the opinion would have no impact on the manner in which individuals were designated. They would continue to abide by recently formulated BOP policy that states that any period of imprisonment must be fulfilled at a BOP or contract prison facility. As you and I have discussed it is terribly important when dealing with the BOP to realize that, historically, the BOP has - to my knowledge - never changed a policy unless DIRECTED to do so. Something that this opinion does not do.

Greg_Nicolaysen: Dave, let's continue discussing the so-called "back-end" halfway house placement, and then shift our discussion to "front end" designations, so that we cover each topic individually.

There is a Bureau of Prisons Program Statement entitled, "Community Corrections Center (CCC) Utilization and Transfer Procedure," which is PS 7310.04, dated 12/16/98. It's 31 pages in PDF form.

Here is a link to that Program Statement:

http://www.afda.org/afda/online_BOPseminar/PS7310_004.pdf

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The introduction states as follows:

This Program Statement defines placement criteria for offenders, requires that staff members start the placement process in a timely manner, and defines the circumstances when inmates may refuse Community Corrections (CC) programs. It also establishes an operational philosophy for CCC referrals that, whenever possible, eligible inmates are to be released to the community through a CCC unless there is some impediment as outlined herein.

Dave: give us the nutshell summary of how defense counsel might find this Program Statement useful.

Dave_Novak: Counsel should familiarize themselves with those factors that might preclude community custody placement for their clients. Inmates unable to provide for their own medical care might be excluded. Inmates with public safety factors and detainers are usually excluded. Inmates with poor BOP conduct records or even those with poor BOP work reports have been excluded in the past. Philosophically it is important to recognize those items that can cause your clients to miss out on this "perk" - the opportunity to spend a portion of their sentences in community custody.

Greg_Nicolaysen: Dave, let's take a hypothetical of a white collar defendant who is currently serving a 36 month term for mail fraud. The question is whether he is likely to be transferred to a halfway house to serve any portion of the final part of his term, and if so, is his halfway house time going to be limited to 10% of the sentence (ie, 3 months), or is the BOP's practice such that he could spend as much as 6 months in a halfway house?

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Dave_Novak: At this time it is the practice of the BOP to award halfway house placement in a formulaic manner. Given your example of a 36 month sentence the inmate would be obliged to serve a total of approximately 30.5 months in custody (after a good conduct time deduction). The inmate would be eligible to serve the last 3.05 months of their sentence in community custody. In short - in order to calculate sentences for clients attorneys should multiply the court ordered sentence by 85% - this will provide the approximate net sentence less good conduct time. The net sentence should then be multiplied by 10%. This number (never to exceed six months) is the amount of time the inmate is eligible to serve in community custody. Exceptions to this rule would be graduates of either the RDAP or ICC program. Regardless of sentence length graduates of either of these programs are eligible to spend the last six months of their confinement in community custody - another reason that attorneys should be aware of the use of these programs as a means of unorthodox post-sentence reduction strategies.

Greg_Nicolaysen: Dave, you do a lot of counseling of white collar offenders to adjust to prison life. Even though a halfway house is a much more desirable setting than prison, to many white collar offenders who have enjoyed the luxury of high-end living in the corporate world, and who tend to be very controlling personalities, a halfway house can still be a major adjustment. Give us a sense of how defense attorneys should counsel the white collar offender to anticipate the adjustments s/he will need to make in order to successfully transition into a halfway house setting.

Dave_Novak: I've been doing this work for eight years now and, almost without exception, my white collar clients have had a more difficult time with their transition to halfway house than their transition to prison. Emotionally inmates look to the date that they are going to leave prison as their "out date". That is to say that inmates refer to this date as the date they are going home. Nothing could be further from the truth. They are not going home - they are, instead - being transferred to a less desirable penal institution. One which allows them to wear their own clothes and go out and work but one in which the living

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arrangement, food and recreational opportunities are all less desirable than those they found in prison. While in prison there is a real "us v. them" mentality. The inmates all wear the same clothes, work the same hours, live in the same manner. That "esprit de corps" begins to break down almost immediately upon arrival at halfway house. All of a sudden the stratification between the haves and have nots is clear. Once sees some inmates being picked up for furloughs in Mercedes Benz while others wait in the rain for public transport. Counsel should encourage their white collar clients, more now than ever, to keep a low profile. Do what they can to blend in and, above all else, remember that halfway house is the end of incarceration and not the beginning of freedom.

Greg_Nicolaysen: Let's turn our attention now to the so-called "front-end" halfway house placement -- that is, the issue of the BOP designating a defendant to a halfway house following his/her sentence in district court.

Dave_Novak: now that we are approaching two full years since the issuance of the BOP memo in December 2002, where does the BOP stand in regard to designating a defendant to a halfway house following the imposition of sentence, to serve any portion of a term of imprisonment?

Despite the 1st Circuit's recent ruling the BOP continues to follow the guidance of the 12/2002 USDOJ letter to Director Kathleen Hawk Sawyer namely - halfway houses are no longer used as a substitute for prison. That is to say, if a person is sentenced to any period of imprisonment they will go through the designation process and will be ordered to surrender to a BOP or contract prison facility. There are two exceptions to this policy - one, as in the case of Martha Stewart - allows the later half of a period of imprisonment to be served in community custody. This REQUIRES an affirmative sentence by the Court ordering such a sentence. The second would be a probated sentence in which a period of halfway house is stipulated as a condition of probation.

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The floor is now open to all of you attending to write questions for Dave. When you post your question / comment, it comes to me as the moderator, and I will then selectively post it to the public viewing screen so as to maintain an orderly flow of the online discussion.

[questions / comments from audience omitted from this outline]

[closing remarks omitted from this outline]