

How About a Second Chance—Recent Developments in Reducing the Convicted Tax Offender’s Time in Prison

*By Steven Toscher and Barbara Lubin**

Steven Toscher and Barbara Lubin examine options available to reduce the convicted tax offender’s time in prison.

Introduction

While the Federal Sentencing Guidelines have now become advisory,¹ and a sentencing court has broad discretion to sentence a convicted tax offender to forms of punishment other than incarceration,² the reality is that many individuals convicted of a federal tax crime will be sentenced to incarceration under the care of the Department of Justice Bureau of Prisons (BOP).

There are recent developments that should be of interest to practitioners representing those who might be headed for federal prison and representing clients currently in prison. The Second Chance Act was signed by President George Bush on April 9, 2008,³ and the BOP’s Residential Drug and Alcohol Program (RDAP) as of March 16, 2009. The Second Chance Act provides broad discretion to the BOP to release an offender to a Residential Reentry Center or community correctional facility up to 12 months prior to the offender’s normal release date. The Second Chance Act also provides for an Elderly Offender Program pilot program to allow elderly offenders to serve up to 25 percent of their remaining sentences on home confinement so long as statutory eligibility is satisfied. If any of these programs are applicable to the tax offender, it can also mean substantial reductions to the period of incarceration.⁴

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Both the Second Chance Act and the BOP’s RDAP are aimed at reducing the incidents of recidivism in the federal prison system. While it would be highly unusual for the typical tax offender to be recidivist, both the Second Chance Act and the RDAP offer mechanisms for the incarcerated tax offender to obtain early release from prison. With regard to criminal tax offenders, the potential inability to continue practicing in their profession may make a Residential Reentry Center a good option to provide support while finding a new way to make a living.

The Second Chance Act

The Second Chance Act was a major legislative effort to curb recidivism by addressing prisoner reentry issues. While the legislation was not targeted at tax offenders, it did provide the BOP broad discretion in placing inmates in Residential Reentry Centers for up to 12 months.⁵ That authority also allows the BOP to place a prisoner in home confinement, including in connection with the Elderly Offender Program.⁶

The Second Chance Act in relevant part provides:

(1) The Director of the Bureau of Prisons shall, to the extent practicable, ensure that a prisoner serving a term of imprisonment spends a portion of the final months of that term (not to exceed 12 months), under conditions that will afford that prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into

the community. Such conditions may include a community correctional facility.

(2) Home confinement authority— The authority under this subsection may be used to place a prisoner in home confinement for the shorter of 10 percent of the term of imprisonment of that prisoner or six months.

(6) Issuance of regulations— The Director of the Bureau of Prisons shall issue regulations pursuant to this subsection not later than 90 days after the date of the enactment of the Second Chance Act of 2007, which shall ensure that placement in a community correctional facility by the Bureau of Prisons is—

(A) conducted in a manner consistent with section 3621 (b) of this title;

(B) determined on an individual basis; and

(C) of sufficient duration to provide the greatest likelihood of successful reintegration into the community.⁷

BOP placement of prisoners, which applies to placements under the Second Chance Act as well, is governed by the provisions of 18 U.S.C. § 3621(b). The relevant factors are:

- The resources of the facility contemplated;
- The nature and circumstances of the offense;
- The history and characteristics of the prisoner;
- Any statement by the Court that imposed the sentence—
 - (a) Concerning the purpose for which the sentence to imprisonment was determined to be warranted; or
 - (b) Recommending a type of penal or correctional facility as appropriate; and
- Any pertinent policy statement issued by the Sentencing Commission pursuant to Section 994(a)(2) of Title 28.⁸

Since the enactment of the Second Chance Act, there have been administrative and case law developments that have further reinforced the goal of reducing recidivism and have confirmed the BOP's broad discretion with regard to such decisions. Many prisoners have unsuccessfully applied for *Habeas Corpus* relief challenging the BOP's denial of their applications to be moved to community corrections facilities. Ultimately,

federal courts will only review such decisions subject to an abuse of discretion standard, and that has proved to be an elusive standard to meet.

The Second Chance Act is somewhat counterintuitive in that a layperson would expect it to apply to people who committed crimes, but were nonetheless amenable to returning to a law-abiding life. While that is the goal, the population the Second Chance Act targets are people who would potentially reoffend in the absence of the community corrections facility. One petitioner argued, “the Second Chance Act contains a ‘fundamental illogic’ that unfairly places prisoners in an ‘Alice in Wonderland world of reversals’ that is both reprehensible and absurd.”⁹ The petitioner based his argument “on the fact that his good behavior, strong family connections and personal resources are used as justifications for assigning him less than the maximum amount of RRC¹⁰ time.”¹¹ In other words, the Second Chance Act is not a reward for good behavior or saved for those prisoners with the least likelihood of reoffending, rather this case demonstrates that the goal is to help prisoners gain community ties and other attributes that reduce recidivism rates who otherwise may have been in greater danger of reoffending.

Considering that most prisoners would greatly prefer to be in a Residential Reentry Facility rather than in prison, many of the requests for *Habeas Corpus* relief place the prisoner and the BOP on the opposite side of the advocacy role from the usual. In the case law, the petitioners frequently point out their risks (such as no family ties or inability to earn a living), while the BOP discusses the advantages that the prisoner has on their side to prevent recidivism.

On June 24, 2010, the BOP issued a memorandum that provides directives to staff when making decisions regarding pre-release of inmates to Residential Reentry Centers. While the Second Chance Act provides for up to twelve months in an RRC placement, the June 24th memorandum reiterates that the BOP's strategy should be to focus on inmates who have a significant need for the community assistance the Residential Reentry Centers are designed to provide. Also, with regard to minimum-security inmates, the memorandum directs BOP staff to determine whether a direct transfer from the institution to home confinement may be appropriate.¹²

Elderly Offender Program

The Second Chance Act directs the BOP to conduct an elderly offender pilot program (“Elderly Offender

Program”) to determine the effectiveness of removing eligible elderly offenders from a BOP facility and placing such offenders on home detention until the expiration of the prison term to which the offender was sentenced.¹³ To be eligible for the Elderly Offender Program, inmates must be at least 65-years old and:

- the offender must be serving a term of imprisonment that is not life imprisonment based on conviction for an offense or offenses that do not include any crime of violence, sex offense or other crimes enumerated in the statute;
- the offender must have served the greater of 10 years or 75 percent of the term of imprisonment to which the offender was sentenced;
- the offender must not have been convicted in the past of any Federal or State crime of violence, sex offense or other crime enumerated in the statute;
- the offender must not have escaped, or attempted to escape, from a Bureau of Prisons institution;
- the BOP must determine that release to home detention under this section will result in a substantial net reduction of costs to the Federal Government; and
- the BOP must determine that the offender poses no substantial risk of engaging in criminal conduct or of endangering any person or the public if released to home detention.¹⁴

While the Elderly Offender Program has several requirements that must be met, it nonetheless may provide some relief for certain offenders convicted of tax and other white-collar crimes. Many convicted of federal tax offenses have no other criminal history. In such cases, providing that a client is over 65, the Elderly Offender Program can ease the sting of a prison sentence by allowing the last 25 percent of the sentence to be served at home.

Bureau of Prisons RDAP

Under the RDAP, prisoners are provided drug and alcohol treatment opportunities, and upon successful completion of the program, early release from prison. The new drug and alcohol treatment program is contained in Program Statement 5330.11 (Psychology Treatment Program Statement) and the early release procedures for those successfully completing the RDAP are contained in Program Statement 5331.02 (Early Release Procedure) admission to RDAP. There are four general criteria for admission to the RDAP:

- There must be a verifiable substance disorder.
- The prisoner must sign an agreement acknowledging program responsibility.
- The inmate must be able to complete all three components of RDAP.
- The prisoner must ordinarily have 24 months or more remaining on his or her sentence.

Importance of Documenting Drug Abuse

The RDAP is in high demand and it is not surprising that many prisoners attempt to obtain its benefits. Accordingly, it is important that the substance abuse, whether drugs or alcohol, be adequately documented for the BOP staff to be able to determine the problem. The types of information the BOP will rely upon are as follows:

- Documentation to support a substance abuse within the 12-month period before an inmate’s arrest on the current offense;
- Documentation from a probation officer, parole officer, social service professional as information that verifies the immediate problem was substance abuse within the twelve month period before the inmate’s arrest of the current offense;
- Documentation from a substance abuse treatment provider or medical provider who diagnosed and treated the inmate for substance abuse disorder within the twelve month period before the inmate’s arrest on his current offense; and

Multiple convictions (two or more) of driving under the influence.

The best way to establish eligibility for the RDAP is through the presentence investigation and process. Information regarding the offender’s alcohol or drug abuse should be provided to the probation officer so it can be incorporated into the presentence report.

The Treatment Program

The RDAP treatment program consists of what is referred to as a unit base component or drug treatment within the prison system for a period of at least six months. Normally there are follow-up services while incarcerated followed by a community based drug abuse treatment that normally lasts at least three months.

Early Release

In addition to obtaining drug abuse treatment during the inmate’s incarceration, the inmate may be eligible for early release for a period not to exceed 12 months. The general criteria for early release are:

- There has to be a diagnosis for a substance abuse disorder;
- The inmate was sentenced to a term of imprisonment for a non-violent offense;
- Successful completion of the RDAP; and
- The inmate is in compliance with the financial responsibility program.

The early release of a successful RDAP inmate is based upon the discretion given to the BOP under 18 U.S.C. § 3621(e). The wide discretion of the BOP in determining eligibility for the RDAP, and thus eligibility for early release, is well established.¹⁵ The most recent program statement (5331.02) establishes the time frame of the early release based upon the length of the offender's sentence.

Section 3621(e) provided in relevant part that:

The period a prisoner convicted of a non-violent offense remains in custody after successfully completing a treatment program may be reduced by the Bureau of Prisons, but such reduction may not be more than one year from the term the prisoner much otherwise serve.

Under the new program statement effective March 16, 2009, offenders found to be eligible for early release may be released as follows based upon their length of their sentence:

- 37 months or more—Up to 12 months
- 31–36 months—Up to 9 months
- 30 months or less—Up to 6 months

Conclusion

Representing clients facing a federal prison sentence offers many advocacy opportunities. While the BOP has broad discretion, the case law also demonstrates the persuasive effect a Judge's recommendations can have on the BOP's exercise of authority. If, for instance, a client would be a candidate for the RDAP, it is important to make sure the drug or alcohol problem

is documented in the Presentence Report. Further, if the Judge is willing to make a recommendation to the BOP to consider the RDAP program, it will likely increase a client's chance of being approved for RDAP. Similarly, if a client would benefit from an RRC, or would be eligible for the Elderly Offender Program, advocating for that path begins well in advance of sentencing.

ENDNOTES

* The original version of this article appeared in the ABA-CLE CRIMINAL TAX FRAUD 2010.

¹ *Booker*, SCT, 543 U.S. 220 (2005); 3d 237, 247 (3d Cir. 2006); *Gall*, SCT, 552 U.S. 38 (2007).

² As noted by Justice Stevens in *Gall*, 128 SCT. at 595-596:

We recognize that custodial sentences are qualitatively more severe than probationary sentences of equivalent terms. Offenders on probation are nonetheless subject to several standard conditions that substantially restrict their liberty ... Probationers may not leave the judicial district, move, or change jobs without notifying, and in some cases, receiving permission from, their probation officer or the court. They must report regularly to their probation officer, permit unannounced visits to their homes, and refrain from associating with any person convicted of a felony, [etc.]. Most probationers are also subject to individual "special conditions" imposed by the Court.

³ Second Chance Act of 2007 (Community Safety Through Recidivism Prevention) P.L. 110-199 (hereinafter the "Second Chance Act.").

⁴ The BOP use to have what was referred to as Intensive Confinement Center or "boot camp," which some tax offenders qualified for and who received a sentence reduction. That program terminated in 2004. See *Serrato v. Clark*, 486 F.3d 560 (9th Cir. 2007). Prior to the Second Chance Act, the BOP discretion was limited to the last ten percent of the term of imprisonment, not to exceed six months.

⁵ 18 U.S.C. § 3624(c).

⁶ *Id.*

⁷ 18 U.S.C. § 3624(c).

⁸ 18 U.S.C. § 3621(b).

⁹ *Crabbe v. Davis*, 2010 U.S. Dist. LEXIS 89063, at 15 (D. Co. 2010).

¹⁰ RRC is an acronym for "Residential Reentry Center," also known as a Community Corrections Facility.

¹¹ *Crabbe* at 15.

¹² Home detention continues to be limited to the final 10 percent of any federal sentence. See 18 U.S.C. § 3624(c).

¹³ *Mathison v. Davis*, 2010 U.S. Dist. LEXIS 51245, 4-5 (D. Co. 2010).

¹⁴ See 42 U.S.C. §17541(g)(5)(A)(I-vii).

¹⁵ See *Germany v. Keller*, 2010 U.S. Dist. LEXIS 76125 (D. Alab. 2010).

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