



Office of the Principal Deputy Assistant Attorney General

Washington, D.C. 20530

December 13, 2002

**MEMORANDUM FOR LARRY D. THOMPSON
DEPUTY ATTORNEY GENERAL**

*Re: Bureau of Prisons practice of placing in community confinement
certain offenders who have received sentences of imprisonment*

Your office has informed us that when a federal offender whom the Bureau of Prisons ("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 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 orders. 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.

I.

We begin by examining whether federal courts have authority under the Sentencing Guidelines to order that the types of sentences at issue here be satisfied by community confinement.

A.

The authority to sentence federal offenders to terms of imprisonment rests with the federal courts under the provisions of the Federal Criminal Code and the Sentencing Guidelines promulgated thereunder. *See* 18 U.S.C. §§ 3553, 3581-3582 (2000); *Williams v. United States*, 503 U.S. 193, 200-01 (1992). The Sentencing Guidelines were promulgated by the U.S. Sentencing Commission pursuant to the mandate of the Sentencing Reform Act of 1984, which

sought to eliminate arbitrary discrepancies in federal sentencing.¹ Subject to the court's authority to depart from Guideline sentencing ranges when certain criteria are satisfied, *see* 18 U.S.C. § 3553(b), federal courts are bound by the provisions of the Sentencing Guidelines when they impose sentences on federal offenders. *See Koon v. United States*, 518 U.S. 81, 92 (1996); *Stinson v. United States*, 508 U.S. 36, 42 (1993).

The Sentencing Guidelines contain base offense levels of increasing severity (from level 1 to level 43), depending upon the seriousness of the offense and the characteristics of the offender with respect to specified criteria. The sentencing ranges applicable to the respective offense levels are set forth in a Sentencing Table that is published with the Guidelines. The Sentencing Table is divided into four different Zones, ranging from Zone A (for the shortest sentences) to Zone D (for the most severe sentences).

The BOP practice at issue here applies to Zone C and Zone D sentences. Zone C encompasses base offense levels 11 and 12 which, in the case of offenses falling into Criminal History Category I (the most favorable criminal history category), establish sentencing ranges of 8 to 14 months of imprisonment and 10 to 16 months of imprisonment, respectively. Zone D demarcates permissible sentences for base offense levels 13 through 43 and, again assuming Criminal History Category I, provides for a sentencing range of 12 to 18 months of imprisonment for offense level 13, and up to life imprisonment for offense level 43.²

For Zone C sentences, section 5C1.1(d) of the Guidelines provides that the minimum term may be satisfied either by a simple "sentence of imprisonment," U.S. Sentencing Guidelines Manual § 5C1.1(d)(1), or by a "sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention," *id.* § 5C1.1(d)(2). In the latter case (sometimes referred to as a "split sentence"), section 5C1.1(d) requires "that at least one-half of the minimum term [be] satisfied by imprisonment." *Id.* The Guidelines state that "community confinement" "means residence in a community treatment center, halfway house, restitution center, mental health facility, alcohol or drug rehabilitation center, or other community facility; and participation in gainful employment, employment search efforts, community service, vocational training, treatment, educational programs, or similar facility-approved programs during non-residential hours." *Id.* § 5F1.1, Application Note 1.

For Zone D sentences, section 5C1.1(f) requires that the minimum term be satisfied by a simple sentence of imprisonment. U.S.S.G. § 5C1.1(f).

¹ *See* Pub. L. No. 98-473, Title II, Ch. II, § 217, 98 Stat. 1837, 2017 (1984), reprinted in 1984 U.S.C.C.A.N. 1837, 2017.

² United States Sentencing Commission, *Guidelines Manual*, Sentencing Table (Nov. 2001).

B.

By its plain terms, section 5C1.1 provides only limited authority to a federal court to order that a Zone C sentence of imprisonment be satisfied by community confinement. In particular, it provides only that a federal court may impose a Zone C split sentence under which the sentence of imprisonment “includes a term of supervised release with a condition that substitutes community confinement or home detention . . . , provided that at least one-half of the minimum term is satisfied by imprisonment.” U.S.S.G. § 5C1.1(d)(2). With respect to Zone C or Zone D simple sentences of imprisonment, section 5C1.1 provides no authority to substitute community confinement for any portion of the sentence.

Consistent with the plain meaning of section 5C1.1, the federal courts of appeals have uniformly determined that community confinement does not constitute “imprisonment” for purposes of satisfying either the requirement under that section that “at least one-half of the minimum term [of a Zone C split sentence] be satisfied by imprisonment” or the requirement that a Zone C or Zone D simple sentence be a “sentence of imprisonment.” In the words of the Second Circuit, “‘Imprisonment’ and ‘community confinement’ are not synonyms. ‘Imprisonment is the condition of being removed from the community and placed in prison, whereas ‘community confinement’ is the condition of being controlled and restricted within the community.” *United States v. Adler*, 52 F.3d 20, 21 (2d Cir. 1995). The Seventh Circuit has likewise stated that section 5C1.1 “plainly draws a distinction between ‘imprisonment’ and either community confinement or home detention” and that this distinction “is consistent with the plain meaning of the term ‘imprisonment.’” *United States v. Swigert*, 18 F.3d 443, 445 (7th Cir. 1994). See also *United States v. Voda*, 994 F.2d 149, 152 (5th Cir. 1993) (stating, in construing Guidelines provision governing Zone B sentence of probation, that “a community corrections facility is not a jail”); *United States v. Latimer*, 991 F.2d 1509, 1513 (9th Cir. 1993) (stating, in construing Guidelines provision governing criminal history, that “the division between imprisonment and community treatment center confinement is emphasized again in §5C1.1”).³

In *United States v. Serafini*, 233 F.3d 758 (3rd Cir. 2000), the Third Circuit opined that where the district court had imposed on the defendant a Zone C 10-month split sentence, consisting of five months of imprisonment and five months of house arrest, the district court would violate the Guidelines if it ordered that the defendant serve the five months of imprisonment in community confinement. *Id.* at 762 n.2, 777-778. Determining that the district court had merely recommended (rather than ordered) community confinement, the Third Circuit stated that BOP would violate the Guidelines if it followed the district court’s recommendation. *Id.* at 778. It further emphasized that “a district court has no power to dictate or impose any

³ Contrary to *Latimer* and *United States v. Pielago*, 135 F.3d 703, 711-713 (11th Cir. 1998), the Sixth Circuit in *United States v. Rasco*, 963 F.2d 132 (6th Cir. 1992), ruled that, for purposes of the Guidelines provision governing criminal history, detention in a halfway house or community treatment center constitutes “being incarcerated.” The Sixth Circuit made clear, however, that its ruling had no application to section 5C1.1. See *id.* at 137.

place of confinement for the imprisonment portion of the sentence." *Id.* at 778 n.23 (emphasis in original). Similarly, the Sixth Circuit ruled that where the district court had sentenced a defendant "to be imprisoned for a term of ten months," the district court could not substitute community confinement for imprisonment. *United States v. Jalili*, 925 F.2d 889, 892-893 (6th Cir. 1991). Language in the court's order purporting to make this substitution was instead to be "stricken from the order as mere surplusage." *Id.* at 893.⁴

In sum, it is clear that federal courts violate the Guidelines if they order that (1) an offender sentenced to a Zone C or Zone D simple sentence of imprisonment serve his sentence in community confinement, or (2) that an offender sentenced to a Zone C split sentence serve the imprisonment portion of his sentence in community confinement.

II.

Having determined that a federal court violates the Guidelines if it orders that a sentence of imprisonment be satisfied by community confinement, we now address whether BOP, either on its own initiative or in response to a federal court recommendation, has general authority to implement a Zone C or Zone D sentence of imprisonment by placing an offender in community confinement.

A.

The Sentencing Reform Act of 1984 not only authorized the Sentencing Guidelines; it also rewrote the provisions governing BOP's implementation of sentences.⁵ Under section 3621 of title 18, BOP is responsible for administering the sentences of imprisonment that federal courts impose on federal offenders:

(a) COMMITMENT TO CUSTODY OF BUREAU OF PRISONS. – A person who has been sentenced to a term of imprisonment pursuant to the provisions of subchapter D of chapter 227 shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed, or until earlier released for satisfactory behavior pursuant to the provisions of section 3624.

(b) PLACE OF IMPRISONMENT. – The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may desig-

⁴ The Sixth Circuit did rule in *United States v. Strozier*, 940 F.2d 985 (6th Cir. 1991), that, for purposes of a Guidelines provision requiring that a court "order a term of supervised release to follow imprisonment when a sentence of imprisonment of more than one year is imposed," the period of community confinement should be included in determining the length of the sentence of imprisonment. Both the Sixth and Seventh Circuits have determined, however, that that ruling on a separate Guidelines provision should not guide the meaning of section 5C1.1. See *Rasco*, 963 F.2d at 137; *Swigert*, 18 F.3d at 446.

⁵ See Pub. L. No. 98-473, Title II, Ch. II, §§ 212, 217, 98 Stat. 1837, 1987, 2007, 2017 (1984).

nate any available penal or correctional facility that meets the minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise and whether within or without the judicial district in which the person was convicted, that the Bureau determines to be appropriate and suitable, considering –

- (1) the resources of the facility contemplated;
- (2) the nature and circumstances of the offense;
- (3) the history and characteristics of the prisoner;
- (4) any statement made by the court that imposed the sentence –
 - (A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or
 - (B) recommending a type of penal or correctional facility as appropriate; and
- (5) any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.

18 U.S.C. § 3621 (2000). In addition, section 3622 authorizes BOP to “release a prisoner from the place of his imprisonment for a limited period” under specified conditions for purposes that include employment, training, and education. *Id.* § 3622. Section 3624(c) further provides that BOP “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.” 18 U.S.C. § 3624(c) (2000). It also specifies that “home confinement” may be used for this purpose. *See id.*

B.

Both BOP’s authority under title 18 to implement sentences of imprisonment and the federal courts’ sentencing authority under the Guidelines were conferred by the Sentencing Reform Act of 1984. It is therefore especially appropriate that they be construed to produce a harmonious interpretation. *See, e.g., Reno v. Koray*, 515 U.S. 50, 56-57 (1995). Because BOP is merely administering the sentences of imprisonment that the federal courts impose pursuant to the Guidelines, we believe that BOP’s authority must be construed, wherever possible, to comport with the legal requirements that govern the sentencing orders. Construing BOP’s authority in this way will also promote Congress’s objective of eliminating arbitrary disparities in punishment between offenders convicted of the same offense. *See supra* pp. 1-2 & n.1.

We recognize that there are certain provisions governing BOP's implementation of sentences of imprisonment that clearly authorize a sentence to be implemented other than according to its seemingly plain terms. In such cases, the rule of construction described above does not come into play because there is no conflict to be resolved. Rather, a harmonious interpretation is achieved in such cases by understanding the sentence to be read in light of, and therefore to incorporate implicitly, the clear statutory provision. For example, section 3621(a) specifies that an offender "who has been sentenced to a term of imprisonment . . . shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed, or until earlier released for satisfactory behavior pursuant to the provisions of section 3624," 18 U.S.C. § 3621(a) (emphasis added). Section 3624(a) in turn provides that a "prisoner shall be released by the Bureau of Prisons on the date of the expiration of the prisoner's term of imprisonment, less any time credited toward the service of the prisoner's sentence" for satisfactory behavior, *id.* § 3624(a) (emphasis added). In light of this clear statutory command, we have no doubt that a sentence imposed under the Sentencing Guidelines must be read as being subject to the command. Thus, where a prisoner serving a three-year sentence of imprisonment has received ten days' credit for satisfactory behavior, BOP, in administering the sentence, must release the offender ten days before the three-year period runs.

The question for us here, then, is whether BOP has clearly been given statutory authority to implement Zone C or Zone D simple sentences of imprisonment, or to implement the imprisonment portion of a Zone C split sentence, by placing an offender in community confinement. BOP has pointed to sections 3621(b) and 3622 as possible sources of authority. We address these in turn.

Nothing in section 3621(b) provides BOP clear authority to place in community confinement an offender who has been sentenced to a term of imprisonment. It is true that section 3621(b) gives BOP broad discretion to designate as "the place of the prisoner's imprisonment" "any available penal or correctional facility that meets minimum standards of health and habitability . . . [and] that [BOP] determines to be appropriate and suitable." But the authority to select the *place* of imprisonment is not the same as the authority to decide *whether* the offender will be imprisoned. Under the statutory scheme, the latter authority lies solely with the court (subject to the requirements imposed by the Sentencing Guidelines), and section 3621(b) does not authorize BOP to subvert that statutory scheme by placing in community confinement an offender who has received a sentence of imprisonment. Thus, even if we were to conclude that a community corrections center or halfway house could qualify as "the place of the prisoner's imprisonment" for purposes of this section, we would not read this general conferral of authority as speaking at all to – much less clearly trumping – the requirement under the Guidelines that community confinement not be used to satisfy a Zone C or Zone D simple sentence of imprisonment or the imprisonment portion of a Zone C split sentence. Moreover, if section 3621(b) were read to confer on BOP unfettered discretion to have offenders serve sentences of imprisonment in community confinement, then the time limitation in section 3624(c) on BOP authority to transfer a prisoner to a non-prison site – i.e., for a period, not to

exceed six months, of the last 10% of the term of his sentence – would be rendered null with respect to community confinement.⁶

In addition, consistent with the federal courts of appeals' reading of section 5C1.1, *see supra* p. 3, we do not believe that a community corrections center or halfway house is a "place of . . . imprisonment" within the ordinary meaning of that phrase. As we understand it, residents of a community corrections center or halfway house, although still in federal custody, are generally not confined to the facility throughout the day but are instead able to pursue outside employment, training, and education.⁷ Indeed, as we understand BOP's policy statement on community corrections centers ("CCCs"), inmates placed in CCCs normally become eligible for weekend and evening leave passes after the second week of confinement. BOP PS 7310.04, Community Corrections Center (CCC) Utilization and Transfer Procedure, ¶ 7.a(1)-(2) (Dec. 16, 1998), available at http://www.bop.gov/progstat/7310_04.html. Reading section 3621(b) as a whole, therefore, we understand the discretion afforded to BOP, under the second sentence, to "designate any available penal or correctional facility that meets minimum standards of health and habitability . . . [and] that [BOP] determines to be appropriate and suitable" to be constrained by the requirement in the first sentence that such facility be a place of imprisonment.⁸

We acknowledge that section 3621(b)(4)(B) provides specifically that BOP may consider, in determining which penal or correctional facility to designate, a judicial statement

⁶ Your office has advised us that BOP, in exercising its authority under section 3624(c), has sometimes not abided by the time limitation set forth in that section. The 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 term to be served," 18 U.S.C. § 3624, and we see no basis for disregarding this time limitation.

⁷ *See, e.g., Bailor v. Salvation Army*, 51 F.3d 678, 683 (7th Cir. 1995) (describing freedom of residents of halfway house); *United States v. Chavez*, 204 F.3d 1305, 1315 (11th Cir. 2000) ("We have previously held that confinement to a halfway house at night with the requirement that a defendant work at a job or seek employment during the day is a liberty 'markedly different from custodial incarceration in a penitentiary.'" (citing *Dawson v. Scott*, 50 F.3d 884, 888 (11th Cir. 1995)); *United States v. Dighera*, 185 F.3d 875 (Table), 1999 WL 390870, at *2 (10th Cir. June 15, 1999) ("We have previously distinguished sentences involving physical confinement, such as incarceration at a prison camp, from non-secured custody such as placement at a halfway house."); *Richardson v. Steffa*, 105 F.3d 669 (Table), 1997 WL 10964, at *1 (10th Cir. Jan. 14, 1997) ("under the community corrections program, [plaintiff] was able to work in the Denver community at good jobs, travel about the community unescorted, and maintain business and social contacts").

⁸ We assume *arguendo* that a community corrections center, halfway house, or other form of community confinement may constitute a "penal or correctional facility" under the provisions of 18 U.S.C. § 3621(b). We note, however, that that term is not defined. In a 1992 opinion in which we concluded that BOP has authority under section 3621 to contract with the private sector for the operation of secure facilities, we declined to draw a distinction between residential community facilities and secure facilities with respect to BOP's contracting-out authority. *See Statutory Authority to Contract with the Private Sector for Secure Facilities*, 16 Op. O.L.C. 65, 70-71 (1992). That opinion, however, did not address the distinct question whether a community corrections center constitutes a "place of imprisonment" under section 3621, nor did it have occasion to consider the line of cases discussed in Part I.B, *supra*, holding that community confinement does not constitute imprisonment.

"recommending a type of penal or correctional facility as appropriate." But any contention that this provision clearly indicates that BOP has authority to have an offender serve a sentence of imprisonment in community confinement depends on two mistaken premises – the premise that there are not various types of places of imprisonment, *but see* 28 C.F.R. § 500.1(d) (listing various types), and the premise that BOP is required to give effect to a judicial recommendation.

Section 3622, which provides for temporary release of prisoners, likewise does not provide clear authority to support BOP's practice. In particular, each of the subparts of section 3622 presupposes that an offender is in a "place of . . . imprisonment," and none authorizes extended placement of a prisoner in community confinement. Subsection 3622(a) permits release of a prisoner for no more than 30 days for various purposes, including attending to important family matters (e.g., attending a funeral or visiting a dying relative), obtaining medical treatment, or contacting a prospective employer. Subsection 3622(b), in authorizing the release of a prisoner to "participate in a training or educational program in the community," provides that the prisoner shall "*continu[e]* in official detention at the prison facility." And subsection 3622(c) provides that a prisoner who obtains temporary release for purposes of "paid employment," shall "*continu[e]* in official detention at the penal or correctional facility."

We therefore conclude that the BOP practice is not lawful.

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In sum: When a federal offender receives a Zone C or Zone D sentence of imprisonment, section 3621 and section 3622 of title 18 do not give BOP general authority to place the offender in community confinement from the outset of his sentence. Nor do they give BOP general authority to transfer him from prison to community confinement at any time BOP chooses during the course of his sentence.

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