

Day One

Prison Programs Resulting in Reduced Sentences

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SUMMARY

Certain Federal Bureau of Prisons (BOP) programs afford individuals an opportunity to reduce their prison terms while incarcerated. This panel discussed the BOP's existing programs—compassionate release, good conduct time, and the Residential Drug Abuse Program (RDAP). It also addressed upcoming implementation of a pilot program, instituted by the Second Chance Act, which contemplates early release from prison of individuals who are 65 years or older, have served at least ten years' imprisonment or 75 percent of their sentence, and meet other criteria. Finally, the panel outlined the need for evidence-based research in determining which within-prison programs are most effective.

Among the topics discussed during this session were the implementation of RDAP and the termination of BOP's boot camp program. BOP personnel described the RDAP's criteria, model, and development. Other panelists discussed the program's effectiveness, but questioned eligibility requirements and the exclusion of certain individuals from the program. Discussion concerning the termination of the BOP's boot camp program centered around whether evidence-based research might prove the program's effectiveness. Critics of the termination urged the BOP to institute a similar intensive confinement program. Panelists found common ground in the idea that alternatives to imprisonment—including BOP programs to reduce imprisonment terms already being served—can reduce recidivism, be more cost-effective than imprisonment, and provide opportunities for individual growth and community safety.

PRISON PROGRAMS RESULTING IN REDUCED SENTENCES

MS. GRILLI: I want to welcome you all here to the first set of breakout sessions. This is Prison Programs Resulting in Reduced Sentences. My name is Kathleen Grilli. I'm the deputy general counsel with the Sentencing Commission, and it is my pleasure to introduce our panel this afternoon.

First, I have seated over here to my right Bryan Feinstein. He's a correctional program specialist in the Policy Development and Training Section of the Central Office of the Federal Bureau of Prisons. He began his career with the Federal Bureau of Prisons as a correctional officer at the Metropolitan Detention Center in Los Angeles and he's moved up the ranks in the BOP.

Next to him is Beth Weinman who is the Bureau of Prison's national drug abuse program coordinator in the Psychology Services Branch of the Correctional Programs Division. In her capacity in this position she's responsible for the design, implementation, and oversight of all drug abuse treatment programs in the Bureau. Before coming to the Bureau, she had additional experience with state and local criminal justice components and community treatment providers.

Next to me at the podium on my left is Steve Sady who is the chief deputy federal public defender for the District of Oregon where he represents clients at the trial level, in habeas corpus proceedings, and on appeal. When we were standing around during the lunch time chit-chatting, the lady and gentleman from the Bureau of Prisons were telling me that they were very much looking forward to meeting Steve because they see his name on papers. He tends to litigate with the Bureau of Prisons an awful lot, and so he'll have a lot to say to you about what they have to say, I imagine.

And then, finally, last but not least, is Dr. Doris Layton MacKenzie, who's a professor in the Department of Criminology and Criminal Justice at the University of Maryland, director of the Evaluation Research Group. She has an extensive publication record on topics such as examining works to reduce crime in the community, inmate adjustment to prison, the impact of intermediate sanctions on recidivism, long-term offenders, methods of predicting prison populations, among others.

I told the panelists to please talk a lot so this would be moderator-light, so I didn't have to do much. And so, with no further ado, I'm going to turn it over to Mr. Feinstein. Thank you.

MR. FEINSTEIN: Thank you. Thank you very much for having me today. I appreciate being invited. I'll be talking about the Bureau of Prisons and some programming.

Basically, the Bureau of Prisons's mission is to protect society by confining offenders cost-effectively and appropriately secured, and providing work and other self-improvement opportunities to help the inmates reintegrate into the community.

We believe incarceration with programs prepares them in the reintegration with job fairs, resume writing, prison industries, or UNICOR, and also a new concept we've gone to over the last few years and implementing bureau-wide now is inmate skills development which will start at the beginning of their incarceration and work through to the end of their incarceration with an integration with probation officers continuing on their program. Most of our programs resulting in reduced sentences have been initiated by Congress through statutory requirement, which I'll be talking about: reduction in sentence, Second Chance Act, and good conduct time.

In talking about sentence reduction, I'm going to talk about compassionate release. We were given that authority under 18 U.S.C. § 3582, and basically I'll go through the process. An inmate may make a request through the warden for a compassionate release. Staff at the institution will include a medical assessment and incarceration assessment to the warden. What they need to have is extraordinary, compelling circumstances. Ordinarily we're looking at terminal illnesses, one year or less to live, permanent physical or mental conditions which severely incapacitate the inmate. The inmates have to have a release plan, a residence, health care treatment plan, and financial community support to help them go back into the community.

The wardens will review the packet and then either approve or deny. If they approve the sentence reduction, it will then go to the regional office where the regional director will then review the packet, look at the assessments, and decide whether they're going to continue this on, or whether they're going to deny it.

If it's continued on, it will arrive here in the central office of the Office of General Counsel. The Office of General Counsel will coordinate the process through the central office. The assessments will be done by the BOP medical director. They'll look at the medical assessments and evaluate the circumstances. Once they have that and the other background information, this will be passed on to the director. It's under his discretion that this either be approved [or not].

If it's approved, it then goes through a motion on our behalf to the court through the sentencing U.S. attorney's office. If at any time an inmate is denied at any level, he or she can appeal through our administrative remedy process, which is a three-tier appeal process starting with the warden at the institutional level, the regional director, and the central office, and they can appeal at each level that they're denied.

The next thing I'll talk about is the Second Chance Act of 2007. In its legislation, Congress included a pilot program called the Elderly and Family Unification Program. This will start in FY '09 and last through the completion of FY '10, so beginning here October 1st of '08 and going through September 30th of 2010. This is a statutory mandate.

The Act lists the following as minimum requirements for eligibility: the offender be at least 65 years or older, have strict guidance on current offenses and priors, serve the greater of ten years or 75-percent term of imprisonment, be a substantial debt reduction in cost to the government, no substantial risks of engaging in future criminal conduct and, in essence, will be put on home detention either at their home, nursing home, or other residential long-term care facility. Currently, our staff is working through the pilot programming. A final policy should be issued here shortly for the pilot to begin October 1st.

Lastly, I'll talk about good conduct time. In essence, there has been good conduct time since the old law ended and new law started, but most of our inmates now are sentenced under the Prison Litigation Reform Act of 1995, PLRA.

The good conduct standard is based on time served, not the time or the length of the sentence. Inmates are awarded 54 days credit for each year served, if the inmate has earned a high school diploma or is acting satisfactorily in [making] progress. They can earn a maximum of 42 days credit if they have not earned a GED, or are not making satisfactory progress. All non-U.S. citizens who are subject to deportation will get the maximum of 54 days a year.

The good conduct time vests under the new law, PLRA, based on the inmate's release date. That's when all their time vests. And, also, under this law they have to have exemplary compliance with the institutional regulations. There are also increased penalties for misconduct, to include loss of good time. [Off topic.]

MS. GRILLI: Thank you, Mr. Feinstein. Now we'll turn it over to Ms. Weinman.

MS. WEINMAN: Good afternoon. I always like this after-lunch thing. I'm going to give an overview of the Residential Drug Abuse Program in the Bureau of Prisons which is the program that, at the discretion of the director, allows for up to a year off an inmate's sentence for successful nonviolent offenders, and it all came about with the Anti-Drug Abuse Act of 1988. The Bureau was provided funding to reestablish the residential programs, and the first program opened in the fall of 1989, and by the end of 1991, we had 33 residential drug abuse programs.

That same year the GAO reviewed our programs and found that we had 33 programs and we had about 400 or less inmates wanting to come. We don't have parole, we have sentencing guidelines, so there was no real incentive for the inmates to enter our drug programs.

And so that resulted in the passage of the Violent Crime Control and Law Enforcement Act of 1994 where the Bureau was required to provide residential drug abuse treatment for all inmates who were eligible, as defined by the Bureau of Prisons, and who volunteered. And you can imagine, we went from no one volunteering to everyone volunteering when they also gave us the incentive of—in the discretion of the director of the Bureau of Prisons—I say this mostly for Steve. We can provide up to a year off an inmate's sentence for a non-violent inmate who successfully completes the residential program, so all of a sudden everyone in the Federal Bureau of Prisons seemed to have a drug problem.

The Violent Crime Control Act also required the Bureau have inmates enter treatment based on their proximity to release; those nearer release would get in ahead of others, and it also provided for an aftercare program. So the Bureau, in its implementation of the program from day one in the late '80s, we've always had that community transition program which is considered completion. You have to go through that to complete the entire program.

The reason we put that in there is because the research and the literature is clear, and continues to be clear, that without that community transition from an in-prison treatment program, the likelihood of success lessens. It's the most difficult time for any inmate, as you can imagine. We spent a lot of time in the institution preparing for a transition, but that actual transition, while the inmate is in our custody and is monitored by our transitional drug program staff and is in drug treatment, that combination of treatment and supervision gives us a higher likelihood for success of the inmate.

Today we have 59 residential drug abuse programs. We have not had any expansion of the program since fiscal year 2003 and, therefore, for the past two years, our waiting list has been about 7,000 inmates daily.

We have about 18,000 inmates who participate in the program each year. Most of the failures occur between the time the inmate completes the residential program and if they have to go back to general population; that's when most of the failures occur, because we look at everything based on behavior change. Either they'll use drugs or have other incident reports.

FY 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. Again, we believe that is because we haven't expanded since 2003, and since 2003 the Bureau's population has increased 17 percent. And we do know that based on the prevalence study that was done in 2004, we know that 40 percent of our inmates have a diagnosable substance use disorder, which is an increase from 34 percent previously.

The average early release inmates are getting today is about 7.64 months, and again, that is because we can't put everyone in to get the year off, given the waiting list. Since July 12th, 34,423 inmates received an early release based on VCLA.

We define inmates to be qualified for treatment as those who have been diagnosed in accordance with the *American Psychiatric Association Diagnostic and Statistical Manual for Mental Disorders*, so we follow that. So if an inmate is diagnosed by a psychologist for a substance use or substance dependence disorder, they would be qualified for the program.

We also find we have to ask for substantiating documentation to the disorder. While I think we're the only people in the galaxy who ask for this, because typically it's self-report, there is, of course, secondary gain, and so we look for documentation from previous treatment providers or in the presentence report or other formal documentation. We do not accept documentation that may be subjective from perhaps, you know, mom or the wife, but we also give them time to provide that documentation. [Off topic.]

Our definition of nonviolent offenders is fairly lengthy. There is a legal program statement that lists all the crimes but, in general, if you will bear with me, inmates not eligible for early release as an exercise of the director's discretion are the following categories: immigration and custom enforcement detainees, pretrial inmates, contractual boarders, inmates who have a prior felony or a misdemeanor conviction for homicide, forcible rape, robbery, aggravated assault, arson, kidnapping, or an offense that by its nature and conduct involves sexual abuse offenses committed by minors, inmates who have a current felony conviction for an offense that has an element of actual or attempted threatened use of physical force against the person or property of another, an offense that involved the carrying, possession, or use of firearm or other dangerous weapon or explosive device, except in the Ninth Circuit, I might add, an offense that by its nature or conduct presents a serious potential risk of physical force against a person or property of another, an offense that by its nature or conduct involves sexual abuse committed against a minor, inmates who have been convicted of an attempted conspiracy or other offense involving other underlying offenses that are listed in the policy. I know that's not helpful, but I thought I'd throw it in, inmates who previously received the early release.

Our programs also accept today inmates with dual disorders, mental illness and substance abuse, if the inmate is stable. Oftentimes they'll be on medication and then come to the program. And since you're here, Warden Beeler, and you opened the first dual disorder program, I can give you that credit. You're welcome. And that population in the Bureau has been growing dramatically over the years. And many, many mentally ill offenders also have a substance abuse problem as a way of medication. I'm sure you all know that.

We had a number of different district court rulings in the late '90s that talked about the Bureau not accepting inmates for an early release who had point enhancements, gun enhancements, or [inaudible]

enhancements. And in the district courts there were different rulings about whether this inmate was eligible if he was in the Seventh Circuit, or this inmate was not eligible if he was in the Fifth Circuit.

So that case finally went to the Supreme Court, and it was decided in January of 2001 in *Lopez v. Davis*. The district courts held that the Bureau could not categorically count out based on sentencing factors or weapon possession, inmates who had an underlying conviction that was non-violent, and the Supreme Court held that it was permissible as an exercise of the Bureau of Prison's discretion under 3621(e), that statute that talks about the early release. The statute says that we may provide an early release for up to one year. It does not say we shall.

There has been a lot of other litigation that we've been involved in and I think sometimes—I can say this out loud—our own policy gets in our way, so we've been working on clarifying things, issues such as what makes up documentation for a substance use disorder, and so to be very specific about what we will accept and what we won't accept.

We have some issues with several expectations that once we tell an inmate that they're eligible, then they're eligible, and that doesn't allow for new information. Every now and again someone may make a mistake and that doesn't allow for that.

For the drug abuse program itself, as I've said before, we use evidence-based programming. Three years ago we redid all of our treatment protocols based on the most recent evidence out there and what works with in-prison programs. We looked at both the correctional treatment literature as well as the drug abuse and mental health treatment literature and research. And we, again, look at inmates totally behaviorally, looking that their behavior has changed. We use things like criminal thinking intervention, motivational interviewing. It's all cognitive behaviorally based. And we continue that from the time they complete the residential—the unit-based portion through any time they head back in the general population and continuing in the community with the community-based treatment.

Finally, the Second Chance Act allows for all Bureau inmates to have halfway house time of up to 12 months and right now, given what our experience that we have had with the community transition piece, that is likely to remain at six months. We've been finding that our inmates are able to successfully complete the treatment in the community in six months, and there's also the opportunity for more treatment if an inmate needs it. If there are problems, we will keep someone in longer to finish treatment rather than let them out early. Okay. We'll be taking questions later.

MS. GRILLI: All right.

MR. SADY: Last time I was in D.C., I was here for the crack retroactivity hearings and my suitcase ended up in Houston. This time my suitcase is in Chicago. Now you may think I'm unlucky, but I think I'm the luckiest person at this conference and I'll tell you why. I'll tell you why. Everybody else I'm hearing says, "I've got to have money for this program," or they're saying, "I've got a statutory change I'd like to suggest," or, "How about an amendment to the guidelines." I don't have to do any of that. I can tell you how federal sentencing can be reduced by hundreds of millions of dollars, thousands of years of incarceration, without spending a penny, just putting into effect the laws we already have.

And it's true, I am a litigator, but it's also true that if you take a look at the materials we've provided, litigation's the last thing we're talking about. It's the most inefficient way of trying to put into

effect programs that are good for the community, good for carrying out the will of Congress. All we're trying to do is put these laws into effect in the most constructive way, and in the way that they were designed initially. So I put litigation as the third thing in each section discussing the ten areas where we can make change, and that's why it's directed to the Sentencing Commission, institutional change, not litigation change. I'm talking about institutional change.

And those types of institutional changes, we'd hope to see the Sentencing Commission take a lead on because Congress expects it. Congress says that the Commission is to measure the degree to which practices are meeting the purposes of sentencing, to analyze for maximum utilization of resources, and to minimize the likelihood that the federal prisons will exceed capacity, which I believe are now 37 percent over capacity. And all of this in the context of the over-arching principle of the Sentencing Reform Act, which is a sentence sufficient, but not greater than necessary.

We've identified in the piece ten areas where statutes are being underutilized resulting in years of over-incarceration. For the Sentencing Commission, I think these ten areas give us three illustrations of the role that the Sentencing Commission can play.

The first is establishing their responsibility for legal standards. Classic example is the mention that we heard from Mr. Feinstein regarding the good time credit system. The statute was first used by the Sentencing Commission in setting up the graph, the sentencing table, that every sentence is based on. That sentence, empirical studies, how much actual time were people doing, and then compare that against what would be 85 percent good time on the sentence imposed. Now what you heard was they give good time on the sentence served which results in a seven day disparity. So what, seven days. Multiply it out. Right now \$983 million of over-incarceration, 36,000 years. The mastodons were walking the earth 36,000 years ago. This is a lot of time, a lot of resources, that simply following what the Sentencing Commission construed the statute to be, if that were put into effect, could do it tomorrow and hugely reduce the amount of expenditure, the amount of incarceration, we have in this country. Every sentence is being imposed at 2.2 percent greater than the empirically set standard from the initial studies that the Sentencing Commission did.

Another example, and I was so heartened to hear the areas that people were talking about in terms of alternatives to incarceration. Good time credit was one of the ones we heard from a couple of the speakers. Another was on second look. Similarly, the statutory delegation in the Sentencing Reform Act was to the Sentencing Commission to decide what constitutes extraordinary and compelling circumstances, to provide examples and give to sentencing judges the discretion, not wardens, sentencing judges. Yes, the Bureau of Prisons was a gatekeeper to alert sentencing judges when there was a time that there were extraordinary or compelling circumstances, not limited to the time when somebody's on the verge of death, but a much broader permission to give a second look at a case to decide whether or not there is sufficient extraordinary and compelling circumstances that the sentencing judge could exercise his or her discretion under 3553(a) to decide whether that sentence should be reduced.

Instead, we have a BOP rule that is inconsistent with what the Sentencing Commission has done with section 1B1.13 setting out a list of factors, and the way that the factors are implemented, again, requires the warden to make a recommendation, the Bureau of Prisons making a positive recommendation, before it even gets to the sentencing judge.

A third area of legal standards involves, for practitioners, one of the biggest areas for unintended mistakes and that is concurrent/consecutive sentences where the later state sentence is ordered to run concurrent and, because of the way that the sentencing statutes are being implemented, section 5G1.3 of the sentencing guidelines is being thwarted by the way the Bureau of Prisons is carrying out sentences. So legal standards is one very important area where the Sentencing Commission can do very important work.

A second area is process, the area of boot camp. For ten years, federal judges were sentencing people off to boot camp. These were non-violent offenders with minimal criminal histories. Down to the guidelines. You get them down to 30 months. You say—as a defense lawyer I got up, because we'll send them off to boot camp. They'll do six months, the rest of the time in community corrections, and a six-month reduction of sentence.

On January 15th of 2005, the Bureau of Prisons sent out a memo to judges, prosecutors, federal defenders, probation officers—the program's over. We've decided that it's no good, it's inefficient. And there may be some disagreements about this. I'm sure that my colleague here has been looking at the question of boot camps, and our view of it is that the state studies upon which the Bureau of Prisons relied were flawed because they did not reflect the same characteristics as the federal boot camp. They didn't have the same screening on who was eligible. They didn't have the same follow-up of community corrections within the Bureau of Prisons and followed by supervised release.

And, most importantly, many of them had a brutal, punitive approach that, anecdotally, those of us who have women defendants who are boot camp eligible, many of them have been victims of domestic violence and that's what was getting them there in the first place. My clients who have gone to state boot camp having their hair shaved, yelled at, and can't speak Spanish because it's not allowed on calls home. That's not the attitude that was true in the federal boot camp. The federal boot camp recognized that was the population they were dealing with and appropriately provided treatment for that population.

So in terms of what the sociology was, there may be disagreements about that. Of course, my bottom line is I don't care if the thing is not working at all. It was still valuable for every judge who saw that the person was doing more time than necessary. Even if recidivism wasn't affected, it still resulted in less incarceration than was sufficient, but not greater than necessary to achieve the purposes of sentencing.

But the worst thing about this was the process. There was no process. Doris wasn't presenting her position, another presenting his or hers, and the judges presenting their views of how it was a useful sentencing tool. The Sentencing Commission had a guideline on boot camp. It was basically amended. It was basically repealed with none of the compliance of sections 994(o) and (p) that require participation of all of the players in the federal system before there is such a drastic change in what sentencing options are available for people who have nonviolent offenses and minimal criminal history. It's exactly the people we should be targeting for lessening the period of incarceration.

The third area goes to discretionary areas and, again, I think that there is a prime role to be played by the Sentencing Commission in trying to assure that sentencing statutes are implemented in a manner that achieves the best result at the same time as achieving the maximum leniency amelioration that Congress has made available. We've seen Congress do mandatory minimum after mandatory minimum,

driving up incarceration rates. When they give us an ameliorative tool, we should be using it to the maximum.

RDAP—this is a great program. Beth should be so proud of the people who put this program into effect that year after year are making huge effects in people's lives. I've been to the graduation. It's a moving experience. I've also talked to literally hundreds of people who have participated in the program, many who I tried to get later to go back to get a sentence [inaudible] terminate their supervised release. It's so great because I get to talk to people who have had successful experiences, who are working, and who tell me time and time again, "This program made a difference in my life. This changed the way I acted, the way I thought, and made my life better and, parenthetically, made the community's life a lot of better, too."

At the same time, this same program allows up to a one-year sentence reduction. The average sentence reduction now is 8.2 months, and the reason is that there is not adequate administration of the program to be able to achieve the full year off for many of the people who are participating in the program. If Congress has authorized it, why not save that \$27 million and use it for something else? Then that's a huge savings strictly over incarceration. Just 3.8 months for every person who's going through there? Why not the year? It can happen. All it needs to do is have a will to be administered in a way that maximizes its ameliorative effect.

The same thing when Beth was describing the program statements, saying who is eligible. Look at who's eligible. There are people who are statutorily ineligible because they're convicted of a violent offense and we don't have any problem with them. And I'm going to have to stop gesticulating so, because if I do it one more time, I'm going to be evicted. The people who are statutorily ineligible because they're convicted on a nonviolent offense, no problem, and, of course, there are program statements explaining why that is.

The initial litigation that Beth described was about who is statutorily eligible. And what happened in October of 1997, perhaps as a litigation strategy, but ultimately what happened was that there was an exercise of discretion that yes, there are people—classes of categorical groups that are eligible for this sentence reduction. They're eligible for this sentence reduction incentive, but we're not going to give it to them because we think that this is a poor way of administering the program.

If you have somebody who has a detainer, for example, which is 37 percent of the population who are aliens, they almost all have a detainer against them. Every one of those people when the program began was eligible for the single year off, and we had plenty of people who were participating in the program who were aliens, and why shouldn't they participate in the program? We see them coming back in the 1326 illegal reentry case. We don't want that drug case. We want the person to deal with the problems and go back to whatever country they are without the problems that will bring them back.

Instead, due to what I believe is just a pure misunderstanding of the American Psychological Association letter saying perhaps there should be more than one meeting during the transition period, there was a requirement imposed in 1996 of community corrections, no discussion of how that would affect people with detainers.

But the reality is everybody with an immigration detainer, everybody with a state detainer, is no longer eligible for the year off because they cannot successfully complete the program, because they can't

do community corrections. Why not allow them the same thing as they were originally allowed, to complete the program and transition? And these are nonviolent offenders. These are people who had substance abuse problems that led them to this juncture and so many of them are Category I and II. These are the people that should be eligible for the year off. We shouldn't be wasting the resources on incarcerating them at the huge expense and time in prison that is unnecessary and that Congress had authorized not to occur.

Same thing is true of the people that were held, and the Bureau of Prisons has now conceded, that the people having mere possession of a firearm are statutorily eligible. Those people can, and in the Ninth Circuit they are eligible for the sentence reduction.

Also, prior crimes of violence. And here's another place where the Sentencing Commission has a special role, and that is that they did the empirical studies regarding criminal history and decided when a stale prior conviction did not have categorically enough relevance that it should count as even a single criminal history point, convictions that are over ten, over 15 years old, depending on the period of incarceration. Those same types of offenses [inaudible]—

We have cases where people come in, say, with a bar fight as an aggravated assault from 40 years ago, 35 years ago, and that's being used to disqualify somebody who was convicted of a nonviolent offense from participating in this program. The system is already harsh enough. It already considers enough factors as aggravation and additional sentence, additional time, that when there is an opportunity, when Congress says yes to an ameliorative measure, it's reasonable for those sentences to be implemented, and for the Sentencing Commission to play a role in lessening the period of incarceration.

Every program has already been authorized, the good time reduction, the folks who are RDAP-eligible with guns, prior convictions, detainers, boot camp, doesn't need to make a change. The dead time on administrative time for INS time, that's another area where there's no reason that it couldn't be implemented tomorrow to lower the period of incarceration.

And I think most profound, is this second look with the extraordinary and compelling circumstances, given that the Commission spent thought and resources in putting together section 1B1.13 to say, "Here's the formula," when a judge should have the opportunity to exercise discretion. That door should be open. That door should be fully available to sentencing judges. Most sentencing judges never hear of the extraordinary and compelling circumstances that end up getting either litigated or ignored. Instead, there's a screening process that basically ends any consideration of factors that are included specifically in section 1B1.13.

So I guess I don't feel as lucky as I did starting out, because it seems like it's so easy. We have the statutes in place. We have a huge difference we could make. Just the good time alone would lower the federal prison population by 2.2 percent, and that would just give people the 85 percent that every state is compelled to do under the truth in sentencing statute. But sometimes even though it sounds so easy, and I think that the will, I'm hoping, comes from the Sentencing Commission using its pulpit, using its authority, using its expertise to encourage to the maximum extent possible that ameliorative statutes be fully effectuated, and to the extent that they aren't, that the guidelines provide another mechanism to compensate for the unnecessary over-incarceration that costs millions of dollars and loss of freedom in an unnecessary way.

MS. GRILLI: All right. Next we'll hear from Professor MacKenzie.

PROFESSOR MACKENZIE: I want to talk about changing and readiness for change, a look at effective programs. I want to talk first about changing offenders and the impact of programs and then move into identifying those ready to change, and I see these as very different things.

Stephen and I are going to be very different on some issues, but in the end there's a lot of agreement. So I am interested in what works in corrections. I've done a lot of work evaluating programs, and those of you that know, I've been involved in studying boot camps for many, many, many years, and also, though, I've really branched out to other topics and have looked at a variety of correctional programs.

So I want to start out talking about my work on changing offenders. I just finished a book summarizing this work on what works in corrections. It's meta-analyses of various correctional programs and it really started with [inaudible].

I wanted to start out talking about changing offenders and programs that have an impact on offenders. I started this work with a report to Congress that was commissioned by the National Institute of Justice, looking at crime prevention in general and I focused on correctional programs. So I essentially wanted to look at outcomes, what reduced future criminal activities and whether or not programs had an impact.

I was particularly interested in randomized trials or strong, high quality research, so one of the things that we did in this report on what works is to examine both the quality of the research and also the outcome for a variety of different programs. When we talked this morning a little bit about randomized trials, and this was one of the things that we were originally interested in this report to Congress. The really important part is this. These are my grandsons and they're twins, and I wanted to make the point that if we wanted to give somebody reading lessons and the other person no reading lessons, it was good to start with a similar group of people and start young. Well, how would you decide which to put there? Randomly assign them.

Most of us are familiar with this in medical research. Now medical research really started emphasizing randomized trials in the '50s and '60s. It's fairly recent for those of us that are my age. I talk to my students and I say '50s and '60s is fairly recent and they look at me like I'm crazy, but to me that's not too long ago.

Anyway, if we had cancer or any of you that have had relatives that had cancer, immediately you start looking at the treatment, and you want to know who's going in, and did they do a high quality random assignment study. You want to know the percent surviving over time. You want to know after one year what are the chances you're going to survive if you have the chemotherapy.

All right. We do the same thing then when we talk about drug programs or other programs in criminal justice and the results of that is evidence-based. A lot of times, though, people use the term evidence-based without really giving an in-depth study of what the evidence shows for programs, so we want to know how long they survive without an arrest or without recidivism. It's exactly same idea as what we're interested in.

So what I ended up doing for this *What Works in Corrections* book is looking at groups of studies. I was interested in recidivism, but there are many other measures of outcome that we might be interested in. I used meta-analysis and also a scoring system that looked at both the quality of the studies and also outcome. I'm not going to have time to really talk about this in detail. I just wanted to give you some examples of programs that have really been found through the research at this point in time to be effective, so that there are a lot of "ifs," "buts," "ors," but if you look at the research, there are a sufficient number of quality studies to draw some conclusions about these treatment programs.

Essentially the programs that are effective, I argue, really bring about a cognitive transformation, a transformation within the person. And I'll just say this as an aside with our emphasis on reentry. One of the things that concerns me about reentry is a lot of times we're giving people opportunities, but we're not always focusing on trying to bring about this cognitive transformation so that they're ready to really take advantage of the opportunities. So give them a work program. That doesn't mean they're going to want to show up. You've got to do something to really change them. If you look at the programs that work, they've had an influence on a kind of cognitive transformation, so they're human service. They target dynamic criminogenic factors, skill-oriented, cognitive behavioral models and multi-modal, so these are kind of general aspects of effective programs.

Here is a list of some that are ineffective, that do not work, and in my book and other publications I've done with colleagues, really support exactly what programs we looked at, what studies were included in these, and you can see correctional boot camps. Again and again, I argue that correctional boot camps do not have an impact. They don't change offenders. The boot camp atmosphere does not change offenders. There are fairly strong studies out there to say they're not having that impact, and so that's my conclusions on the boot camp. This is the focus on the boot camp atmosphere. You can do treatment in boot camps. Then it's the treatment that's having the effect. So ineffective programs have poor or no theory, are poorly implemented, focus on punishment and deterrents as control, and emphasize ties or bonds without changing the offender first.

But I really want to get to where Stephen and I agree on this, and we do, what works in corrections. So my focus of my research has been mostly on changing offenders, reducing their future criminal activities by changing them. But there's another area that we really could be interested in, and this was the important point, I think, that Stephen's making, we can also learn something from research that isn't having an impact on changing the offender, but we can't identify readiness for change.

In other words, behavior tells us something about what is going on, in this case which twin is feeling happy, so we can look at behavior and learn something. Most of the time readiness for change has been looking at kind of psychological measures, how ready is somebody to take advantage of drug treatment, can we give them a different program because they're ready?

What I'm talking about here is the signaling of fact with behavior. I've always been hesitant to talk about this with boot camps because people actually start to confuse having an impact on the person with the program, which I said in the interpretation and analysis of the research on boot camps, they don't change the person, but they do have a signaling effect. A signal is an action, gesture, or sign used as a means of communication, to communicate something with an action or gesture.

And I'll give one example here. This is a prisoner training program. They're responsible for training dogs. They get the dogs as very young puppies. They have a program in Maryland, a women's

prison, and they live in a special section of the prison. They have to get up early. They have to take care of these puppies. And they lose those puppies after one year. They turn them over. They'll be used as therapeutic dogs, for seeing-eye dogs, for other therapeutic purposes, so it's a very valuable social program. Fifty percent of the prisoners drop out of the program. That signals something about the people. This is a socially valuable program, but it also tells us something about who's willing to do the work. Now I'm willing to bet that those people are going to adjust better on the outside. There's no research that tells us anything about that.

But the signaling effect—what I'm talking about here is using a program to select those who will succeed on the outside. In this case, it's comparing dropouts to completers, which is not a study of impact. It doesn't tell us the program changed the people. It only tells us that those people that are willing to finish the program will do better on the outside.

The important factors are rigorous program accountability, responsibility, and if we look at programs, dropouts usually have higher recidivism and completers have lower recidivism. So it's kind of holding them accountable. I think the drug court brings this in, those that are willing to work on drug treatment.

Two programs that have been used for early release are boot camps and drug treatment, and this is really where we're in agreement. A short-term structured program that releases offenders early is beneficial if we're looking at non-violent offenders who are not community risks, and we want to know who's going to do better on the outside. Again, I say boot camps do not change the person, but it can be used as a comparison.

I came across this with the drug treatment frequently because the early drug treatment research frequently said we're comparing the motivated offenders with the non-motivated offenders. That meant we're comparing the completers with the dropouts. Lousy impact research to say whether the program is having an impact, but valuable in saying maybe these people have earned their way out and are ready to be let out. We can now make a distinction, and if you look at dropouts and completers in boot camp and drug treatment, you find that dropouts do worse when they get out in the community than those who complete the program.

So we could use the signaling effect to draw a distinction. My argument is in the case of boot camps, the program may not have an effect. Why then run a boot camp type program? Why not run programs that either have been shown to change offenders, like the drug treatment, or have social benefits like these dog training programs? Then we can actually have a signaling effect and know who's ready to do the work and will be a better candidate for release.

I think I'm probably running out of time. I'm okay? So with the boot camps then, we're kind of in disagreement, but there's a lot of agreement. I'm saying they could be used for a signaling effect, but the argument from me with the boot camp is why do the boot camp? Let's do another structured program with physical exercise and beneficial activities and treatment programs that we know work, but to also use it as a signal for those that are willing to do the work, so use new models of reduced sentencing.

So we can use the developed reduced sentence program, make it a rigorous program, increase the treatment. If we have both a program that has an impact on offenders and a rigorous program that signals who's ready to change, we may both benefit. Now we're not just interested in recidivism rates, although

that's part of our interest. Our other interest is we're getting people out of prison, we're saving money, and we're getting people who don't need to serve that much time in prison.

So essentially the research overall shows that we can reject "nothing works." We need more rigorous research, but there is research, a sufficient amount of research, out there that we can draw conclusions [from]. We should do more randomized trials. We need to bring about cognitive change so people will take advantage of the programs or opportunities they might be given, use the signal effect, and then combine effective treatment with the signaling.

[Off topic.]

MS. GRILLI: Okay. Thank you.

MR. SADY: I'd like to answer her question.

MS. GRILLI: You want to ask a question?

MR. SADY: No, answer her question.

MS. GRILLI: Oh, you want to answer her question? Okay, answer her question.

MR. SADY: Why boot camp? There's one really great reason. It's the only thing that Congress has authorized for sentence reduction besides RDAP, and that's why the toss to the trash can without having considered the signaling effect. As I said, I think it probably has a good effect on recidivism, but for one thing, the people entering it are first-time offenders with non-violent offenses. The likelihood that they're going to have any difference in recidivism is because most of them are going to do quite well anyway. We want to find ways of getting them back to the community. If there's a signaling effect, that's reason alone that the Commission should be fighting to keep the program alive, because Congress has authorized it. Otherwise, there's only that one little program and that means that all of our first time offenders who don't have substance abuse programs, but maybe got involved because of an abusive relationship, have no type of ameliorative program they can obtain.

MS. GRILLI: Okay. I'm going to open it up to questions. I'll start with Dr. Lattimore.

DR. LATTIMORE: Yes. Just to follow on that, as I was listening to your discussion, Doris, also to you, what struck me again was this notion of [inaudible] right? And when you started talking about boot camps and what a boot camp is in the federal system, I was remembering back to juvenile leadership academies. They call it a boot camp, but you turn them into something positive.

And then, of course, the problem that we have with all of those programs—you know, Doris, a few were listed there and, of course, everybody has their list, but you know, we have to be so careful. What I think is we have to be so careful about what it is we mean by, you know, this kind of drug treatment program or motivational programs for juveniles, or boot camps. I think what you were arguing, Steve, was that from your perspective you don't throw the baby out with the bath water on the federal side. If you can find out a way to make the bath more palatable or something, then that's a good thing, or maybe there are differences in the bath. And so, you know, we can take advantage of that.

But then when you start looking at the evaluation literature, there's this whole notion of exactly what is it that you're reading about and how effective it is. This big caution light went off about, you know, Doris, what boot camps you looked at from the state side and we know that there are exceptions to those at the state level and then the federal, as well.

MS. GRILLI: Warden Beeler?

WARDEN BEELER: I'm Art Beeler. I'm the warden at the Federal Correctional Complex at Butner. I can say a whole lot of things about what Steve said, and probably should leave those alone, except to say one thing, don't ever forget the individual. Boot camps actually hurt some people in this country, too, especially women and young men, too. But I want to ask Doris a question. Are there any actuarial devices that can be used to demonstrate when signaling is taking effect?

PROFESSOR MACKENZIE: No. There is very little research on this perspective because what we've ended up doing is criticizing the research that would look at dropouts and completers because it wasn't good impact research, so it's really an idea that people haven't studied as maybe beneficial.

WARDEN BEELER: Thank you.

MS. GRILLI: Okay. Mr. LINN?

MR. LINN: I'm Kenny Linn, chairman of the Federal Chapter of CURE. I'll direct this to Beth. Steve covered most of what my question was to be, but he focused the solution towards the Sentencing Commission. So let's say we have a guy in the BOP with a documented substance abuse problem. He's got a 50-year-old domestic violence misdemeanor for slapping his girlfriend when he was 16 years old. He's ineligible for time off. And we have a guy with a drug bust and he has a registered gun in his glove compartment five blocks away from a crime, picks up a 924(c). He's ineligible for time off. Now my question is this—this is up to the BOP's discretion. Why is there not some thought going into changing this policy for those people that need the program, want the program, feel they're being discriminated against because they're not going to get the time off? Why can't these policies change? What is the logic in keeping these people out of the drug abuse program?

MS. WEINMAN: You can go to the drug abuse program whether you're eligible for the early release or not.

MR. LINN: Oh, I'm aware of that, but—

MS. WEINMAN: So we're not keeping those people you described out of the program.

MR. LINN: You're just not giving them the time off, and that's why they're not entering the program.

MS. WEINMAN: Well, there's about one-third of the inmates participating in the drug program who are not eligible for the year off.

MR. LINN: But I'm saying there's so many people that should be eligible that are not committing to the program because you refuse to give them the time off, and I don't understand the logic in not giving them the time off for these types of crimes.

MS. WEINMAN: Well, I think the logic comes down to the belief that a violent criminal is—what we're looking at is protecting the community.

MR. LINN: But if you really considered those kinds of people like I just gave you these examples, do you consider them truly violent criminals? Because I think there's an oxymoron involved here. I think it's very likely that they're not violent at all. Somebody that does a *nolo contendere* plea when he's 16 years old and is now 60, I don't believe, you know, for that type of a crime he should be considered a violent criminal.

MS. GRILLI: Well, for purposes of allowing everybody else to ask questions, I'm going to move this along. I will say I think that the question of who is and is not a violent offender is something that torments all of us who are working in federal and state sentencing policy, because we can all agree to disagree on certain people that get qualified under both state and federal law. I move it on to Mr. Bussert. Your question?

MR. BUSSERT: I'm Todd Bussert. I'm a private defense attorney. Ms. Weinman, with respect to the issue of eligibility for the program beyond offense of conviction, what about the issue of sustained remission? It's an unwritten policy that the Bureau uses that essentially precludes people that are considered pure or they don't have a drug problem based on their substance abuse relative to the time of their offense or other procedural issues. What's the Bureau's perspective on that? Why isn't it a written policy? Is that something that's going to be in the revised statement? You know, what's the rationale for that?

MS. WEINMAN: Well, we use the *Diagnostic and Statistical Manual of Mental Disorders*, 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.

MR. BUSSERT: Prior to.

MS. WEINMAN: Right, prior to your incarceration, right.

MR. BUSSERT: Well, my understanding is it varies based on different variables, that it could be a year prior to arrest. If there was no arrest, it would be a year prior to indictment. If it was coming out of a plea, it would be a year prior to incarceration.

MS. WEINMAN: The policy says right now a year prior to incarceration, so that means the year before you were incarcerated you did use any drugs. So the response is if someone is not using drugs in the year before they were incarcerated, they may not need the most intensive drug treatment program.

MR. BUSSERT: This is always my problem with this criterion. I'm sorry. My problem with this criterion is you take persons who, say, get a five-year sentence and they satisfy that criteria because they've had 13 months of sobriety before they were incarcerated. They can't get in the drug program, but someone else who gets a 20-year sentence can get in the program even though he or she have been—

MS. WEINMAN: Because the year before their incarceration—

MR. BUSSERT: But in terms of relatively, actually entering the program, they have a longer period of sustained remission because they've been in Bureau custody and presumably—

MS. WEINMAN: Yes, but we're only looking at that year before incarceration.

MR. BUSSERT: I understand.

MS. WEINMAN: We're not looking at the 20 years.

MR. BUSSERT: But the question is why?

MS. WEINMAN: Because that's the standard in the *Diagnostic and Statistical Manual* and that's what we follow.

MR. BUSSERT: I've never seen it, so—

MS. WEINMAN: I'm sorry?

MR. BUSSERT: I've never seen that criterion in the—

MS. WEINMAN: It is.

MR. BUSSERT: —in terms of whether an incarcerated person should get treated.

MS. GRILLI: All right. Ms. Mariano?

MS. MARIANO: Marianne Mariano for the Federal Defenders. I have a quick question, maybe for Dr. MacKenzie and then a more general question for everybody. Is there a study that does talk about just the federal boot camp? And I ask this because anecdotally, I cannot tell you how successful it was for so many of my clients. I'd like you to answer that, but let me just ask both of them [inaudible]. The other question I had is just taking for granted what you did say about signaling, and one of my favorite clients who did the boot camp program, who is wonderfully rehabilitated. Maybe he did signal on pretrial release, so I'm going to say that in his case, not all of them, but in his case maybe that's right. So my question for everybody, and then especially the BOP folks, is why wasn't boot camp simply reformed, because if the evidence-based information is that the really in-your-face kind of driven, driven, driven, humiliating aspect of the boot camp program is not successful, but that the discipline and empowering part of that program is successful. I guess my question is, is anybody doing anything about that? Because it really is one of the only statutory ways to reduce recidivism within the BOP and get people back out sooner. So I guess I'm wondering if there's that program and then what, if anything, is going on?

PROFESSOR MACKENZIE: I don't remember any outcome study looking at recidivism for BOP, but there have been many studies that have argued that they were more treatment-focused.

MR. SADY: There's a 1996 Lewisburg study.

PROFESSOR MACKENZIE: Oh, okay. I couldn't remember whether there was.

MR. SADY: No. It found that it was slightly effective.

WARDEN BEELER: Moderately?

MR. SADY: Yeah. It was not a panacea and I think that's also the way the—Congress when it first put into effect the boot camp said, "This isn't going to be a panacea," because the BOP didn't like it at the time when it was being put into effect.

MS. GRILLI: Can you answer the question about why not continue the studies?

PROFESSOR MACKENZIE: I'm not an official smart person in that area.

MS. GRILLI: Okay. Do you know?

WARDEN BEELER: What's the question?

MS. GRILLI: The question is if the program, the federal program, was not effective, why weren't changes made to it to make it more effective basically?

WARDEN BEELER: Well, the question is twofold. The Bureau never had a traditional boot camp in the sense of state correctional boot camps. The Bureau never instituted a boot camp that was a military, humiliating boot camp. That's not ever been our posture and never going to be our posture, at least as far as I'm aware, as long as I'll be around. So there wasn't a sense of changing something that we would not have been doing. The sense of the boot camp research—the reason and the rationale—is why spend and I understand all the arguments about being able to [inaudible] for reduction of sentence. But the argument was and continues to be, why put very limited resources into a program that doesn't demonstrate effectiveness, and you guys can jump all over that all you want to, okay? Reduction of sentence is just one portion of that argument because you have to look at the totality, not just the individuality.

MS. GRILLI: Ms. Love? She has a question in the back. Yes.

MS. LOVE: I'm Margaret Love. I have something to add to your list. It seems to fall into all three categories, the legal standards, the process and the discretionary decisions, but this one is not a BOP decision. It was a decision on the part of [inaudible] to discontinue the [inaudible] corrections facilities at the front end of the sentence in 2003. And I would be sort of interested—this is part of actually [inaudible] as well since the legal opinions are if that change is made, it has to be [inaudible] authority against the Commission guidelines for the zone—

MS. GRILLI: So, indeed, it would be those ineligible for any kind of alternative?

MS. LOVE: Yes, right.

MS. GRILLI: Yes.

MS. LOVE: And because the designation authority of BOP has now been construed, I believe, to include designation to a community corrections facility, I'm wondering if BOP has had any second thoughts at the back end. I wonder if you all have had any second thoughts about reviving what had been the practice for many years of placing short-sentenced people, even in Zone B, into a community corrections facility to serve their entire sentence.

MR. FEINSTEIN: That's out of my scope, unfortunately, but to my knowledge I haven't seen anything reconsidered, but again that's above my knowledge. Warden Beeler might be able to—

WARDEN BEELER: Margaret, where are you?

MS. GRILLI: She's behind the pole.

WARDEN BEELER: Hi, Margaret. The Second Chance Act has changed a lot of the legislation to allow things to happen. Quite frankly, the implementation process of the Second Chance Act hasn't [inaudible] with the Act.

MS. LOVE: This is not a Second Chance issue. It's not a reentry issue.

WARDEN BEELER: Yes, but it was addressed in the Second Chance Act.

MS. LOVE: Not that particular aspect. This is not a 3624(c). It's a 3621(b).

WARDEN BEELER: Okay.

MS. LOVE: This is the initial designation—

WARDEN BEELER: Yes, ma'am, but—

MS. LOVE: —to a community corrections facility. It's not on your way out. It's an entire term. And before December 2003, people who were sentenced to between maybe 12 and 18 months—

WARDEN BEELER: You mean before the DOJ decision on halfway houses?

MS. LOVE: Before the famous decision, that's right, and they directed BOP to shut that practice down.

WARDEN BEELER: I don't know of any change to that, quite frankly, right now.

MS. GRILLI: Thank you to the panelists and thank you all for coming.

