



**Federal Bar  
Association**  

---

**San Diego Chapter**

**Two-Part Criminal Legal Skills Series:  
Litigating and Advocating at Sentencing**

**Effectively Litigating at the Presentencing Stage — Written Materials**  
**February 17, 2021**

# **Contents**

<b>Exemplar Presentence Report .....</b>	<b>1-10</b>
<b>Inmate Programming Resources .....</b>	<b>11-30</b>
<b>Female Integrated Treatment Program (FIT).....</b>	<b>11</b>
<b>Residential Drug Abuse Program (RDAP).....</b>	<b>12</b>
<b>Mothers and Infants Together Program (MINT).....</b>	<b>29</b>
<b>Federal Rule of Criminal Procedure 32 (Sentencing) .....</b>	<b>31-35</b>
<b>Southern District Local Rule 32.1 (Presentence Reports) .....</b>	<b>36-37</b>
<b>Career Offender Guidelines .....</b>	<b>38-43</b>

**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

**UNITED STATES OF AMERICA** )

**vs.** )

**PRESENTENCE INVESTIGATION REPORT**

) **Docket No.:** Case Number with the presiding  
judge's initials

**Defendant's name** )

**Prepared for:** The Honorable (insert presiding judge information)

**Prepared by:**

**Assistant U.S. Attorney**

AUSA name and contact information to  
include address, phone number and email  
address

**Defense Counsel** (appointed or retained  
counsel)

Defense counsel name and contact  
information to include address, phone  
number, and email address

**Sentence Date:** Date and time of sentencing

**Offense:** Federal statute section for the offense of conviction and class of the  
conviction.

**Penalty** Statutory terms for custody; supervised release; fine; and special  
assessment.

**Arrest Date:** Date of arrest

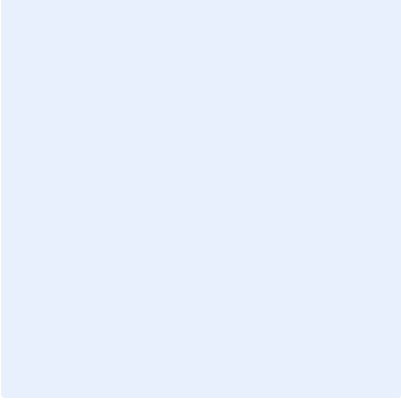
**Release Status:** Information regarding release if released on bond and custody credits  
served as of the day of sentencing.

**Detainers:** Information regarding immigration detainers or pending charges.

**Codefendants:** Co-defendant information to include next court date and type of  
proceeding (i.e., sentencing, motion or status hearing)

**Related Cases:** Related case number and related defendant name to include next court  
date and type of proceeding (i.e., sentencing, motion or status hearing)

**Identifying Data:**

<b>Date of Birth:</b>	Date Of Birth	
<b>Age:</b>	Age	
<b>Race:</b>	Race Description	
<b>Hispanic Origin:</b>	Hispanic Description	
<b>Sex:</b>	Sex Description	
<b>Eye Color:</b>	Eye Color Description	
<b>Hair Color:</b>	Hair Description	
<b>Height:</b> convert	Height inches	
<b>Weight:</b>	Weight lbs.	
<b>SSN#:</b>	SSN	
<b>FBI#:</b>	FBI Number	
<b>USM#:</b>	Register Marshal Number	
<b>CII#:</b>	State ID Number	
<b>CA/DL#:</b>	Driver License Number	
<b>ICE#:</b>	INS Number	
<b>PACTS#:</b>	Client ID	
<b>Education:</b>	Education	
<b>Citizenship:</b>	Citizen Description	
<b>Immigration Status</b>	Immigration Status	
<b>Country of Birth:</b>	Country Of Birth	
<b>Place of Birth:</b>	Place Of Birth	
<b>Current Address:</b> Choose an item.	Name and address of facility if the defendant is in custody	
<b>Legal Residence:</b>	Legal address prior to arrest or current address on bond	
<b>Alias(es):</b>	Other names used to identify the defendant	
<b>Alternate IDs:</b>	Other identifying information related to the defendant to include other state numbers or DMV information.	

***Restrictions on Use and Rediscovery of Presentence Investigation Report.*** Disclosure of this presentence investigation report to the Federal Bureau of Prisons and rediscovery by the Bureau of Prisons is authorized by the United States District Court solely to assist administering the offender's prison sentence (i.e., classification, designation, programming, sentence calculation, pre-release planning, escape apprehension, prison disturbance response, sentence commutation, or pardon) and other limited purposes, including deportation proceedings and federal investigations directly related to terrorist activities. If this presentence investigation report is rediscovered by the Federal Bureau of Prisons upon completion of its sentence administration function, the report must be returned to the Federal Bureau of Prisons or destroyed. It is the policy of the federal judiciary and the Department of Justice that further rediscovery of the presentence investigation report is prohibited without the consent of the sentencing judge.

---

**This presentence report has taken into consideration the statutory factors listed at 18 U.S.C. § 3553(a) and the advisory sentencing guidelines.**

## **PART A. THE OFFENSE**

### **Charge(s) and Conviction(s)**

1. This section will include the date a charge or charges were filed against the defendant and the federal statute of the offense. This section will also include the number of counts as charged.
2. The count of conviction and date of conviction.

### **The Offense Conduct**

3. This section will include a summary of the offense and any post arrest statements made by the defendant.
4. This section also will include comments from the AUSA, case agent, and defense counsel.

### **Victim Impact**

5. This section will include information from any victim impact statements.

### **Pretrial Supervision Adjustment**

6. This section will include information regarding the defendant's adjustment on pretrial bond supervision.

### **Custody Adjustment**

7. This section will include information on the defendant's adjustment in custody to include any positive adjustments or disciplinary actions taken.

### **Defendant's Statement of the Offense**

8. This section will include the date and place the defendant was interviewed by the probation office. The defendant's input to include any statements of motive or remorse will be in this section of the report.

### **Offense Level Computation**

9. The 2018 Guidelines Manual, incorporating all guideline amendments, was used to determine the defendant's offense level. USSG §1B1.11.

### **Count 1: Count of conviction**

10. **Base Offense Level:** The base offense level for the count of conviction.

- 
11. **Specific Offense Characteristics:** This section includes any guideline increases or decreases related to the count of conviction.
  12. **Adjustment for Role in the Offense:** Role analysis and recommendation to include an increase for aggravating role, a decrease for mitigating role, or a zero for neither.
  13. **Adjusted Offense Level (Subtotal):**
  14. **Acceptance of Responsibility:** Determination of acceptance of responsibility to be made by the probation officer pursuant to USSG § 3E1.1(a). -2
  15. **Acceptance of Responsibility:** Determination to be made by the Government pursuant to USSG § 3E1.1(b). -1
  16. **Total Offense Level:**

## **PART B. THE DEFENDANT'S CRIMINAL HISTORY**

17. Unless otherwise indicated, the defendant was represented by defense counsel or waived attorney representation for the following case(s).

### **Sources of Information**

18. Computer clearances were conducted through the FBI, CII, California Department of Motor Vehicles (DMV), courts and law enforcement agencies. Relevant documents were requested and are referenced for the following entries.
19. Per Welfare and Institutions Code § 827, juvenile case records are confidential. Any supporting documentation of the following juvenile history was obtained with the express agreement that it shall not be made part of any other court file that is open to the public.

### **Juvenile Adjudication(s)**

20. Any juvenile adjudications to include the arrest date; arresting agency; charged offenses; court jurisdiction and case number; a summary of the arrest; and determining guideline for scoring. Adjustment to supervision is included if the information is available.

### **Adult Criminal Conviction(s)**

21. Any adult convictions to include the arrest date; arresting agency; charged offenses; court jurisdiction and case number; a summary of the arrest; and determining guideline for scoring. Adjust to supervision is included if the information is available.

### **Criminal History Computation**

22. This section will include the total number of criminal history points and criminal history category.

---

**Other Criminal Conduct**

23. This section will include any additional arrests where a conviction is not present or cases that have been dismissed.

**Pending Charges**

24. This section will include pending charge information.

**PART C. OFFENDER CHARACTERISTICS****Immigration Information**

25. This section includes immigration information relating to the defendant's immigration status; active immigration detainers; and past removals and deportations.

**Personal and Family Data**

26. This section will include the following background information for the defendant: date and place of birth; family information; childhood adjustment information; marital and relationship information; information on offspring; and residential history. This section will also note any sources of confirmation or corroboration of the defendant's background.
27. Release Plans: Release plans or future aspirations.

**Physical Condition**

28. This section will include medical information relating to any present or past medical chronic conditions or surgeries.
29. This section also includes information on identifying marks such as tattoos or scars.

**Mental and Emotional Health**

30. This section will include information regarding any past mental or emotional health diagnosis or conditions. Also, past suicidal ideations or attempts. Mental health counseling or treatment will be summarized in this section.

**Substance Abuse**

31. This section will summarize a defendant's drug and alcohol history to include types of drugs used and frequency of use. Drug counseling or treatment will also be highlighted in this section.

**Educational, Vocational and Special Skills**

32. This section will summarize schools or vocational programs attended including dates of attendance, programs of study and diplomas and degrees obtained. This information will be presented in chronological order.

**Employment Record**

33. This section will summarize present or past employment to include employer information; dates of employment; job title; and performance and pay information if available. This information will be presented in chronological order.

**Financial Condition: Ability to Pay**

34. This section will include a breakdown of the defendant's financial profile. Specifically, the defendant's income; expenses, assets; liabilities, and civil judgments. The probation officer will review this information to determine whether the defendant has the ability to pay a fine in the case.

**PART D. SENTENCING OPTIONS**

The guideline options are advisory pursuant to **United States v. Booker**.

**Custody**

35. Statutory Provisions: Minimum and maximum custody term determined by the statute of conviction.
36. Guideline Provisions: The total offense level and criminal history category are included in this section to arrive at the guideline imprisonment range.

**Supervised Release**

37. Statutory Provisions: The maximum term of supervised release is included in this section along with the guideline.
38. Guideline Provisions: The guideline range for supervised release is included in this section along with the guideline.

**Probation**

39. Statutory Provisions: This section will include information about the eligibility of probation for the defendant and recite the class of the offense. This section will also include information about whether the defendant is eligible for an alternative sentence under the guidelines.
40. Guideline Provisions: This section will include the zone of the Sentencing Table the defendant is placed in and eligibility for probation.

**Fines**

41. Statutory Provisions: The maximum fine is included in this section of the report.
42. Guideline Provisions: The fine range for the offense of conviction is included here.



---

**Third Party Risk**

43. Any relevant third-party information will be included in this section.

**Impact of Plea Agreement**

44. Based on the written plea agreement, the parties have agreed to the following advisory guideline calculations:

An outline of the guideline calculations as it is presented in the plea agreement is included in this section of the report.

**PART E. FACTORS THAT MAY WARRANT DEPARTURE**

45. Any factors that may warrant an upward or downward guideline departure and the corresponding guideline is outlined in this section of the report.

**PART F. FACTORS THAT MAY WARRANT A SENTENCE OUTSIDE OF THE ADVISORY GUIDELINE SYSTEM**

46. This section includes an analysis of any factors that may warrant an upward or downward variance in the case.

**PROBATION OFFICER'S ANALYSIS/JUSTIFICATION**

47. **In analyzing this case and formulating a recommendation, the probation officer has considered the advisory sentencing guidelines and pertinent policy statement(s) issued by the Sentencing Commission in effect on the date of sentencing, along with the factors listed at 18 U.S.C. § 3553(a).**
48. This section of the report is reserved for an independent case analysis from the probation officer to arrive at a case recommendation. This section of the report will include a summary of the preceding information and factors previously addressed in the report.
49. The final guideline range is included in this section and a custodial and supervised release recommendation is made. In cases where safety valve is pending, an alternative recommendation is included in this section in anticipation of the guideline range changing prior to sentencing.
50. Justification for supervised released conditions may be included in this section of the report.
51. This section may also include a recommendation for a fine or restitution.

---

**SENTENCING RECOMMENDATION****Custody**

52. Statutory Maximum: Statutory maximum custodial term
53. Guideline Range: Custodial guideline range
54. Recommendation: Probation officer's custodial recommendation

**Supervised Release**

55. Statutory Maximum: Statutory maximum supervised release term
56. Guideline Range: Supervised release guideline range
57. Recommendation: Probation officer's recommendation

**Recommended Conditions of Supervision**

58. That the defendant abide by the mandatory and standard conditions of supervision and the following condition(s):

The probation officer's recommended conditions of supervised release will be enumerated in this section.

**Fine**

59. Statutory Maximum: Statutory maximum fine
60. Guideline Range: Fine range
61. Recommendation: Probation officer's recommendation
62. Restitution: Restitution information

---

**Special Assessment**

Special assessment information

Respectfully Submitted,

By:

Reviewed and Approved:

Supervisory U.S. Probation Officer

SENTENCING SUMMARY CHART

USPO   x    
AUSA        
DEF      

Defendant's Name: Last, First Middle

Docket No. \_\_\_\_\_ Dkt--

Guideline Manual Used: November 1, 2018

Agree with USPO Calculations:

Base Offense Level: (Drug Quantity, if Applicable: Guideline and base offense level ) \_\_\_\_\_

Specific Offense Characteristics: As noted in the Offense Level Computation section.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Victim Related Adjustment:

Adjustment for Role in the Offense:

Adjustment for Obstruction of Justice:

Adjustment for Reckless Endangerment During Flight:

Adjusted Offense Level:

- Combined (Multiple Counts)  Career Offender  Armed Career Criminal

Adjustment for Acceptance of Responsibility:

Total Offense Level:

OL

Criminal History Score:

Criminal History Category:

- Career Offender  Armed Career Criminal

Guideline Range:

from \_\_\_\_\_

(Range limited by:  minimum mandatory  stat maximum)

to \_\_\_\_\_ mths

Departures:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Resulting Guideline Range:

from \_\_\_\_\_

to \_\_\_\_\_ mths

The FIT (Female Integrated Treatment) Program is an evidence-based approach designed to ensure that each participant has an individually tailored treatment plan and receives a full-range of services to address their needs. The program will combine three psychology treatment programs, including RDAP (Residential Drug Abuse Program), into a single, integrated therapeutic community. Women not actively in need of mental health, substance use, or trauma treatment may focus on work-related goals and providing peer support.

## **Drug Abuse Treatment**

The BOP offers several drug abuse treatment programs; they include:

- Drug Abuse Education Course
- Non-residential Drug Abuse Treatment Program
- Residential Drug Abuse Treatment Program (RDAP)
- The Challenge Program

The Bureau's drug abuse treatment strategy has evolved in recent years and advanced to align with evidenced-based research. Drug abuse treatment is aimed at reducing relapse; reducing criminal thinking; reducing recidivism; reducing inmate misconduct; increasing inmates' stakes in societal norms; increasing employment opportunities; improving physical and mental health and improving relationships.

### **RDAP – BOP's RESIDENTIAL DRUG TREATMENT PROGRAM**

The BOP offers sentenced inmates the opportunity to participate in a Residential Drug Abuse Program (RDAP.) This 500-hour program (9-12 months in duration) is voluntary, and inmates are only eligible if inmates have a verifiable and documented substance abuse problem within the past 12 months.

**Eligibility to participate in the program is not determined by citizenship; however, inmates must be able to complete all phases of the program, which includes community transition treatment. Inmates with disqualifying convictions or who are not U.S. citizens, but have documented substance abuse disorders, may still participate in the program but will not receive an early release benefit for completing the program successfully.**

The following inmates are not eligible for RDAP Early Release

- Non-US Citizen/ICE detainees
- Pretrial inmates
- Contractual boarders (e.g., state or military inmates)
- Inmates with active state/local detainees
- Inmates who previously received an early release under §3621(e)

The following are disqualifying convictions for the early release benefit. Inmates who have a prior felony or misdemeanor conviction within 10 years of the date of sentencing for:

- Homicide
- Forcible rape
- Robbery
- Aggravated assault
- Arson
- Kidnaping
- Sexual abuse offense

Diagnostic criteria (DSM-V) are used in determining substance abuse or dependence for the inmate. Included in this process is the inmates' present or past history of substance abuse, and the BOP relies heavily upon information contained in the PSR. The court's recommendation at sentencing for participation in the program helps support the inmates' eligibility. RDAP Participation is incentivized. Eligible inmates who successfully complete the program may be granted up to 12 months' early release, on the following sliding scale:

< 30-month sentence – up to 6-month reduction
31-36 months sentence – up to 9-month reduction
> 37-month sentence – up to 12-month reduction

Individuals with a minimum of a 12-month custodial sentence may be eligible to participate in the program; however, usually at least a 24-month sentence is required. Inmates with sentences of over three years are not ordinarily eligible for participation into the program until they are within 36 months of release.

In addition to the RDAP, the BOP offers Drug Abuse Education and Non-Residential Drug Abuse Treatment Programs at all BOP facilities.

**The Bureau's Drug Abuse Strategy – A Treatment Continuum Includes:**

Drug Abuse Education – a motivating educational experience, not only covers the basics regarding substance use and its effects, but also serves to identify inmates with a further need for programming and refer offenders for appropriate treatment.

Nonresidential Drug Abuse Treatment – for inmates who have short sentences, those who may not meet the criteria for the Residential Drug Abuse Program (RDAP), those awaiting RDAP, those transitioning to the community, those with positive urinalysis, etc. Nonresidential treatment is a 12-week, cognitive behavioral therapy (CBT) treatment program, conducted primarily with groups, that provides rational thinking, criminal lifestyles, communication skill building, and institution/community adjustment techniques.

DAP is the Bureau's most intensive treatment program. It too follows the CBT model of treatment wrapped into a modified therapeutic community model in which inmates learn what it is like living in a pro-social community. Inmates live in a unit separate from general population, participate in half-day programming and half-day work, school, or vocational activities. RDAP is typically nine months in duration. The Bureau and National Institute on Drug Abuse combined funding and expertise to conduct a rigorous analysis of the Bureau's RDAP. Research findings demonstrated that RDAP participants are significantly less likely to recidivate and less likely to relapse to drug use than non-participants. The studies also suggest that the Bureau's RDAPs make a significant difference in the lives of inmates following their release from custody and return to the community.

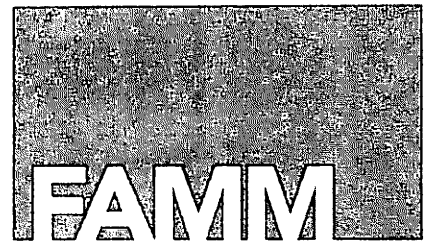
An often-overlooked component of all psychology treatment programs that was first included in drug abuse programming is the Community Transition Drug Abuse Treatment (TDAT) requirement – e.g., the continuation of drug abuse treatment in the community upon transfer to a residential reentry center (RRC). Research has found this period to be the most vulnerable time for an inmate to relapse into drug use and/or criminal behavior. Research also demonstrates continued treatment and supervision is an essential element in the inmate's treatment success. In fact, successful RDAP completion requires completion of TDAT.

The primary responsibility of Regional TDAT staff is to monitor an inmate's treatment progress during his/her stay in the RRC. This level of clinical oversight ensures each inmate receives a level of treatment and management similar to that provided in a Bureau institution. Regional TDAT staff members continue to be an important part of evolving efforts on rehabilitating offenders, not only with drug use disorders, but inmates with mental illness and other behavioral problems. This expansion provides inmates the access to necessary treatment and services as they transition into the community.

Regional TDAT staff members have developed a complex network of community-based contract providers to deliver treatment to Bureau inmates residing in an RRC or on home confinement. The approximately 400 contractors are licensed and certified professionals – e.g., certified addictions counselors, social workers, professional counselors, psychiatrists, and medical doctors. These services are provided within a reasonable distance of the RRC where the inmate resides. On rare occasions and when State regulations allow, the community-based treatment provider may conduct treatment services at the RRC.

The Regional TDAT personnel work closely with U.S. Probation to establish a continuum of treatment as the inmate leaves Bureau custody and moves to supervised release under U.S. Probation. To facilitate this process, U.S. Probation is provided with a comprehensive discharge/termination report on all inmates who have participated in treatment in the community. This provides the supervising U.S. Probation Officer valuable information of what went on before release from Bureau custody – the inmate's treatment progress and treatment needs.





**Q5: How does a prisoner “complete” the RDAP?**

**A:** The RDAP is only completed when a prisoner finishes all three phases. Though prisoners are awarded a “certificate of completion” at the end of the residential, unit-based program, they do not graduate until all three phases are complete. When the entire program is completed, prisoners receive a “certificate of achievement,” a copy of which is placed in their central file. To complete the program successfully, prisoners must attend and participate in all RDAP activities and pass each RDAP testing procedure.

**Q6: How long is the wait to get into the RDAP?**

**A:** Despite the restrictions on eligibility, the program is very popular among those who do qualify, and space is limited. The BOP has estimated that thousands of people are on the waiting list. Prisoners who get on the RDAP waiting list can be removed for bad behavior. If this happens, they must wait six months before reapplying for the RDAP.

**Q7: How soon can a prisoner start the RDAP?**

**A:** Ordinarily, not until they are within 24 months of their release date. Priority for entry to the program is given to people who are closer to their release dates.

**Q8: Is everyone who has used or sold drugs eligible for the RDAP?**

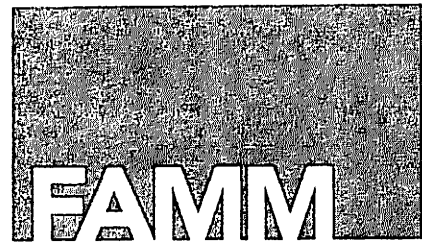
**A:** No. Eligible prisoners are those who:

- Have a verifiable substance use disorder (see below);
- Are willing to participate in the program;
- Sign a statement accepting responsibility for the obligations of the program;
- Have at least 24 months of their sentence remaining, ordinarily; *and*
- Are able to complete all three phases of the RDAP, including the community-based program in a halfway house. This means that anyone who is not eligible for placement in a federal halfway house is *not eligible for the RDAP at all*. This includes:
  - ICE (or INS) detainees (people being detained for being in the country illegally or subject to deportation after serving their sentences);
  - Pretrial inmates (people who haven’t been convicted yet); *and*
  - State inmates or military inmates.

If a prisoner is eligible for the RDAP, but not for the sentence reduction (see below), he can still participate in the RDAP.

**Q9: Can prisoners still be eligible for the RDAP if they must, for health reasons, live outside the RDAP wing or unit?**

**A:** Yes. Prisoners with physical disabilities or medical conditions that require sleeping in another part of the prison can be eligible for the RDAP. They must be otherwise eligible and able to participate in *all* other program activities, including evening activities. They will be held to the same standards as all other participants and must complete the same program requirements.



**Q10: How does a prisoner get into the RDAP?**

**A:** Prisoners can either be referred by unit or drug treatment staff, or they can apply by making a request to the drug abuse program coordinator (DAPC), who will determine whether the prisoner

- Has enough time left on his sentence (typically, 24 months) to complete the RDAP;
- Has a documented and verifiable substance use disorder within the 12-month period before the prisoner’s arrest for his current offense;
- Has a cognitive or learning impairment that makes him unable to participate in the RDAP; *and*
- Can participate in the RDAP in the language in which it is conducted (typically, English).

**Q11: What is a “verifiable” substance use disorder?**

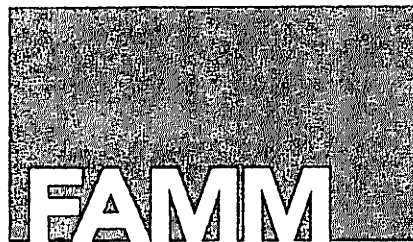
**A:** The RDAP is limited to those who have real, verifiable substance abuse problems and desire treatment. “Verifiable” means that the problem is documented, preferably in the Presentence Report (PSR). Letters from a medical doctor or mental health professional, a drug abuse treatment provider, a parole or probation officer, a social worker, or a judge’s recommendation are helpful in showing that the prisoner has a “verifiable” substance use disorder. Two or more convictions for DUI or DWI in the five-year period before the prisoner’s most recent arrest may also verify that the prisoner has a substance use disorder. Any written documentation of an inmate’s substance abuse problems should be sent to the BOP and put in the prisoner’s central file.

If there is *no* verifying documentation of a substance use disorder in the prisoner’s central file, the prisoner must be given the opportunity to have documentation sent directly to the drug abuse treatment staff at his prison. The prisoner can also have a physical examination at Health Services to document physical proof of a substance use disorder, such as track marks. Or, if a prisoner received substance detoxification when he was first admitted to the BOP, he can give the drug treatment staff permission to contact Health Services and verify that fact.

**Q12: What is a substance use disorder?**

**A:** It is more than merely recreational, social, or occasional use of alcohol or drugs. A “substance use disorder” means that a prisoner’s drug or alcohol abuse meets the definition of substance abuse or dependence in the Diagnostic and Statistical Manual of the Mental Disorders, Fourth Edition (DSM-IV):

- **Dependence** includes having a history of substance use which includes the following: (1) substance abuse (see below); (2) continuation of use despite related problems; (3) increase in tolerance (more of the drug is needed to achieve the same effect); and (4) withdrawal symptoms.
- **Abuse** is “a pattern of substance use leading to significant impairment in functioning. One of the following must be present within a 12 month period: (1) recurrent use resulting in a failure to fulfill major obligations at work, school, or home; (2) recurrent use in situations which are physically hazardous (e.g., driving while intoxicated); (3) legal problems resulting from recurrent use; or (4) continued use despite significant social or interpersonal problems caused by the substance use. The symptoms do not meet the



criteria for substance dependence, as abuse is a part of this disorder.” This diagnostic impression must be reviewed and signed by a drug abuse treatment program coordinator. DIAGNOSTIC AND STATISTICAL MANUAL OF THE MENTAL DISORDERS (DSM-IV) (American Psychiatric Publishing, Inc. / Jaypee (4th ed. 2000).

**Q13: Why might someone with verifiable substance abuse problem not be allowed to participate in the RDAP?**

**A:** The BOP may deny someone access to the RDAP by claiming that the person is in “sustained remission.” According to the DSM- IV, a person is in “sustained remission” if he has not used drugs for 12 consecutive months prior to his arrest. One exception to this rule is when the person is in a “controlled environment” during that 12-month period (i.e., “closely supervised and substance-free jails, therapeutic communities, or locked hospital units.”). DSM-IV at 175-83. If a person is in a “controlled environment” during the 12-month period before his arrest, and does not use drugs during that 12-month period, the DSM-MD IV says the person is not in “sustained remission.”

The 2009 BOP rules say that eligible prisoners must be able to show that they had a substance use disorder, supported by documentation, within a 12-month period before the prisoner was *arrested* for his current offense. *See* Program Statement # 5330.11, Chap. 2, p. 12 (Mar. 16, 2009). This is a change to previous rules and addresses a problem that had previously been litigated in the courts.<sup>1</sup>

Those facing incarceration should **talk with their lawyers** about how to properly document a substance use disorder so that they can participate in the RDAP in the future.

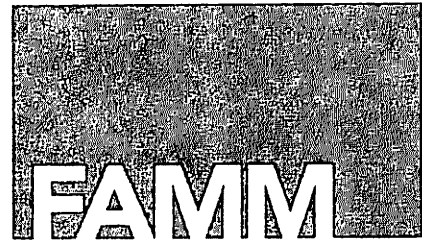
**Q14: What is the RDAP clinical interview?**

**A:** Every prisoner must complete a clinical interview with the drug abuse program coordinator (DAPC), who will decide whether the prisoner is eligible to participate in the RDAP. Prisoners are only interviewed for the RDAP *after* the DAPC has reviewed the documentation of their substance use disorder. The interview is usually scheduled no earlier than 24 months before the prisoner’s release date.

**Q15: Does every BOP prison have an RDAP?**

**A:** No. The following BOP prisons have the RDAP:

- **Mid-Atlantic Region:** FPC-Alderson, WV; FPC-Beckley, WV; FCI-Beckley, WV; FCI-Morgantown, WV; FCI-Butner, NC; FMC-Lexington, KY; FPC-Cumberland, MD; FCI-Cumberland, MD; FCI-Petersburg Medium, VA; FCI-Petersburg Low, VA
- **North Central Region:** FPC-Englewood, CO; FPC-Florence, CO; FCI-Florence, CO; FPC-Leavenworth, KS; FCI-Leavenworth, KS; FPC-Greenville, IL; FCI-Pekin, IL; FCI-Oxford, WI; FPC-Yankton, SD; FCI-Milan, MI; FCI-Sandstone, MN; FCI-Waseca, MN; FPC-Duluth, MN; MCFP-Springfield, MO
- **Northeast Region:** FCI-Elkton, OH; FCI-Danbury, CT; FCI-Fairton, NJ; FCI-Fort Dix, NJ; FPC-McKean, PA; FPC-Lewisburg, PA



- **Southeast Region:** FCI-Jesup, GA; FCI-Coleman, FL; FCI-Marianna, FL; FCI-Tallahassee, FL; FPC-Miami, FL; FPC-Pensacola, FL; FPC-Talladega, AL; FPC-Edgefield, SC; FPC-Montgomery, AL; FCI-Yazoo City, MS
- **South Central Region:** FCI-Bastrop, TX; FPC-Beaumont, TX; FCI-Beaumont, TX; FPC-Bryan, TX; FMC-Carswell, TX; FCI-Fort Worth, TX; FCI-La Tuna, TX; FCI-Seagoville, TX; FPC-Texarkana, TX; FCI-Forrest City, AR; FPC-Forrest City, AR; FCI-El Reno, OK
- **Western Region:** FPC-Dublin, CA; FCI-Dublin, CA; FCI-Herlong, CA; FPC-Lompoc, CA; USP-Lompoc, CA; FCI-Terminal Island, CA; FPC-Phoenix, AZ; FCI-Phoenix, AZ; FCI-Sheridan, OR; FPC-Sheridan, OR
- **Contract Facility:** RCI Rivers, NC

This list changes occasionally, as the availability of programs expands or shrinks. Check [http://www.bop.gov/inmate\\_programs/substance.jsp](http://www.bop.gov/inmate_programs/substance.jsp) for updates to this list.

**Q16: How do people get into the RDAP if they aren't at a prison that has one?**

**A:** People at prisons that don't have the RDAP can transfer to another prison that does have the program. Prisoners classified at a higher security level than the RDAP prison allows will have to first have their security level reduced. If the BOP approves a higher-security prisoner's application into the RDAP, prison staff will change the prisoner's security level so the prisoner can participate at the facility that has the RDAP.

**Q17: Can a person be kicked out of the RDAP or withdraw from it?**

**A:** Yes. Bad behavior and rule-breaking can lead to being expelled from the RDAP. Prisoners must typically be given at least one formal warning or treatment intervention before they can be kicked out. However, committing a prohibited act involving drugs, alcohol, violence, threats of violence, escape, violating the confidentiality required by the program, or any 100-level series incident is grounds for immediate removal from the RDAP. Prisoners can also voluntarily withdraw from the program.

**Q18: What happens after a person is kicked out of or withdraws from the RDAP?**

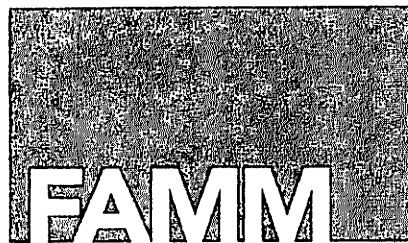
**A:** The BOP may – but is not required to – transfer the prisoner back to their last prison.

**Q19: Can a person reapply for the RDAP if he has been kicked out, failed, or withdrew?**

**A:** Yes, after waiting 90 days. The prisoner should file an Inmate Request to Staff form with the DAPC. If the prisoner is readmitted, he does not receive credit for any participation in the last RDAP program he was in.

**Q20: Can a person be punished for failing to participate in the RDAP?**

**A:** Yes. The BOP's 2009 rules have penalties for non-participation if the sentencing judge recommended the RDAP but the person didn't volunteer for it, or if the person withdraws or is expelled from the RDAP. These prisoners can lose eligibility for furloughs; bonus, vacation, or enhanced performance pay; assignments to prison industries jobs; and time in a halfway house.



**Q21: Who is not eligible to receive a sentence reduction for completing the RDAP?**

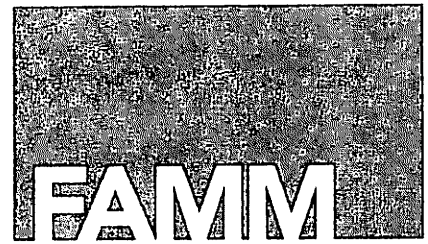
**A:** Prisoners that meet any of the following criteria *cannot* receive the sentence reduction, even if they complete the RDAP:

- ICE detainees (these people are also not eligible for the RDAP);
- Pretrial inmates (people who have not yet been sentenced) (these people are also not eligible for the RDAP);
- State or military prisoners (these people are also not eligible for the RDAP);
- D.C. offenders who committed their crimes before August 5, 2000;
- Federal prisoners who committed their crimes before November 1, 1987;
- Prisoners with prior felonies or misdemeanors for homicide, forcible rape, robbery, arson, kidnapping, aggravated assault, or child sexual abuse offenses;
- Prisoners currently serving time for a felony crime that involved:
  - The actual, attempted, or threatened use of physical force OR
  - Serious potential risk of physical force OR
  - The carrying, possession, or use of a firearm or other dangerous weapon or explosives (including any explosive material or explosive device) OR
  - Sexual abuse committed upon children OR
  - An attempt or conspiracy to commit any of these types of offenses OR to commit homicide, forcible rape, robbery, aggravated assault, arson, kidnapping, or child sexual abuse;
- Prisoners who aren't eligible for placement in a halfway house or on home confinement;
- Prisoners who already received the RDAP sentence reduction for completing the RDAP while serving a previous prison term (i.e., if a person was in federal prison before, completed the RDAP, and got the RDAP sentence reduction, then was released, reoffended, and returned to federal prison, the prisoner will not get the RDAP sentence reduction for completing the RDAP during their second prison term); *and*
- D.C. Code offenders sentenced for a "crime of violence" under D.C. Code § 23-1331(4).

**Q22: What kinds of current convictions will make a person ineligible for the RDAP sentence reduction?**

**A:** Only those convicted of a "nonviolent offense" are eligible for the RDAP sentence reduction under 18 U.S.C. § 3621(e)(2)(B). Over the years, the BOP's interpretation of "nonviolent offense" has led to litigation and several important revisions of the RDAP rules and program statements.

For years, the BOP interpreted "nonviolent offense" as excluding anyone convicted of a "crime of violence" (see 18 U.S.C. § 924(c)) from eligibility for the RDAP sentence reduction.<sup>2</sup> The BOP lists crimes of violence in BOP Program Statements # 5162.02 and # 5162.05 (available in prison law libraries and at <http://www.bop.gov/DataSource/execute/dsPolicyLoc>). However, the BOP's broad definition of "crime of violence" sparked years of litigation that resulted in a split among the circuit courts.



In 1997, the BOP abandoned its “crime of violence” standard. It issued a new interpretation of the “nonviolent offense” requirement. This temporary rule became permanent in 2000. Under the 2000 rule, the BOP exercised its discretion and made certain groups of offenders (including many gun offenders) ineligible for the RDAP sentence reduction. In *Lopez v. Davis*, 531 U.S. 230, 239-41 (2001), the Supreme Court held that categorically denying these offenders the RDAP sentence reduction was a proper use of the BOP’s discretion.

After additional litigation (see below), the BOP issued new rules in January 2009, which went into effect on March 16, 2009. The 2009 rules use almost exactly the same language as the BOP used in its 2000 rule.

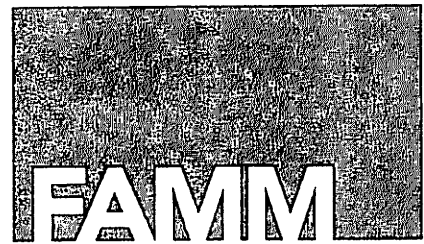
Under the 2009 rules, in the BOP’s use of its discretion, a person is not eligible for the RDAP sentence reduction if their current conviction was a felony that:

- (A) has as an element, the actual, attempted, or threatened use of physical force against the person or property of another, or
- (B) involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives (including any explosive material or explosive device), or
- (C) by its nature or conduct, presents a serious potential risk of physical force against the person or property of another, or
- (D) by its nature or conduct, involves sexual abuse offenses committed upon minors.

Additionally, people convicted of an attempt or conspiracy to commit any of these types of offenses or an attempt or conspiracy to commit homicide, forcible rape, robbery, aggravated assault, arson, kidnapping, or child sexual abuse are not eligible for the RDAP sentence reduction.

**Q23: Under the 2009 rules, what kinds of current convictions will make a D.C. Code offender ineligible for the RDAP sentence reduction?**

**A:** D.C. Code offenders are only eligible for the RDAP sentence reduction if they are currently serving time for a nonviolent offense committed after August 5, 2000. Violent crimes are clearly defined and listed at D.C. Code § 23-1331(4) and include “aggravated assault; act of terrorism; arson; assault on a police officer (felony); assault with a dangerous weapon; assault with intent to kill, commit first degree sexual abuse, commit second degree sexual abuse, or commit child sexual abuse; assault with intent to commit any other offense; burglary; carjacking; armed carjacking; child sexual abuse; cruelty to children in the first degree; extortion or blackmail accompanied by threats of violence; gang recruitment, participation, or retention by the use or threatened use of force, coercion, or intimidation; kidnapping; malicious disfigurement; manslaughter; manufacture or possession of a weapon of mass destruction; mayhem; murder; robbery; sexual abuse in the first, second, or third degrees; use, dissemination, or detonation of a weapon of mass destruction; or an attempt or conspiracy to commit any of the foregoing offenses.”



**Q24: Are prisoners whose current convictions involved guns eligible for a sentence reduction?**

**A:** Under the 2009 rules, federal prisoners currently serving time for a felony that involved “the carrying, possession, or use of a firearm or other dangerous weapon or explosives (including any explosive material or explosive device)” are not eligible for the RDAP sentence reduction, even if they complete the RDAP. However, there is a lengthy and important history of litigation behind this rule, and more legal challenges may come in the future.

***The Pre-2009 Rules***

As described above, for years the BOP categorically refused to give the RDAP sentence reduction to those convicted of a “crime of violence.” The BOP interpreted “crimes of violence” to include many gun crimes:

- 18 U.S.C. § 922(a)(4),(a)(7),(a)(8),(b)(4),(b)(5),(d)(1),(d)(2), (d)(4),(d)(8),(o), or (p) (or conspiracy to commit a violation of one of these sections)—various firearm violations, including illegal sales, deliveries and possession.
- 18 U.S.C. § 924(c) (or conspiracy to commit a § 924(c) crime)—the use or carrying of a firearm during and in relation to any crime of violence or drug trafficking crime
- 21 U.S.C. §§ 841 or 846 drug crimes, *when paired with a 2-point gun enhancement*.

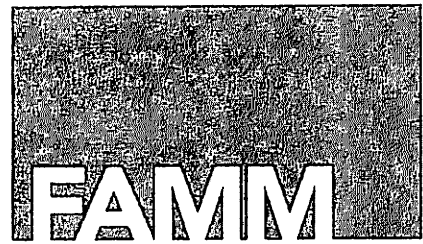
Including these gun crimes in the definition of “crime of violence” sparked years of litigation and led to a split among the circuit courts. In 1997, the BOP abandoned the “crime of violence” standard and issued a temporary rule that categorically denied the RDAP sentence reduction to anyone whose “current offense is a felony... [t]hat involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives[.]” That temporary rule became permanent in 2000. It made anyone convicted under 18 U.S.C. §§ 922, 924, or 21 U.S.C. §§ 841 or 846 (with a two-point gun enhancement) ineligible for the RDAP sentence reduction. Eight circuits once again disagreed about whether the BOP could exclude all of these prisoners. In *Lopez v. Davis*, 531 U.S. 230, 239-41 (2001), the Supreme Court found that, yes, the BOP could – the 1997 temporary rule was a permissible use of the BOP’s discretion as an agency.

***Paulsen***

Then, in *Paulsen v. Daniels*, 413 F.3d 999, 1004-05 (9th Cir. 2005), the Ninth Circuit found that the BOP’s 1997 temporary rule had not been created properly under the Administrative Procedures Act (APA). *Paulsen* invalidated the 1997 temporary rule, but not the permanent rule issued by the BOP in 2000. Thus, even after *Paulsen*, most of those convicted for crimes involving a gun have still been unable to receive the RDAP sentence reduction.

***Arrington***

Then, in early 2008, the Ninth Circuit decided *Arrington v. Daniels*, 516 F.3d 1106 (9th Cir. 2008). *Arrington* picked up where *Paulsen* had left off and invalidated the BOP’s 2000 rule. Under the APA, when government agencies like the BOP create rules, they have to show, on the record, that they had adequate, rational reasons for creating the rule the way they did. If the agency doesn’t support its rules with good reasons, the rule is “arbitrary and capricious” and can



be struck down. The BOP's administrative record behind its 2000 rule didn't provide a clear and rational basis for denying the RDAP sentence reduction to all gun offenders. This made the BOP's 2000 rule "arbitrary and capricious," so the court struck the rule down.

### ***The 2009 Rules***

On January 14, 2009, the BOP issued new regulations regarding the RDAP. These new regulations went into effect on March 16, 2009, along with two new program statements, # 5330.11 and # 5331.02 (also see # 5162.05, which categorizes types of offenses). In the 2009 rules and program statements, the BOP again says that anyone whose "current offense is a felony... [t]hat involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives" is **not** eligible for the RDAP sentence reduction. In the future, FAMM expects to see the 2009 rules challenged in the courts in the same way the BOP's 2000 rule was challenged in *Arrington*. Check our website, [www.famm.org](http://www.famm.org), for updates on any challenges to the BOP's 2009 regulations.

### **Q25: I'm incarcerated in the Ninth Circuit. What do *Paulsen* and *Arrington* do to help me?**

**A:** *Paulsen* and *Arrington* are only binding in the Ninth Circuit (Arizona, California, Idaho, Montana, Nevada, Oregon, or Washington).

*Paulsen* gives a remedy to prisoners in the Ninth Circuit who have been denied the one-year reduction if they:

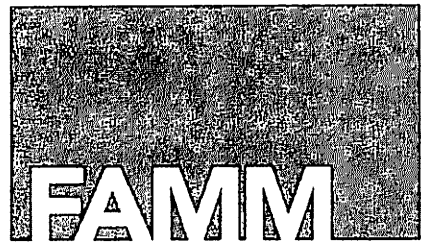
- completed the RDAP between Oct. 9, 1997, and Dec. 22, 2000,
- were denied the RDAP sentence reduction because their current offense is for violations of 18 U.S.C. § 922 or 21 U.S.C. §§ 841, 843, or 846 and involved a gun,
- are not in the Fourth or Fifth Circuit (these circuits still uphold the BOP's decision to categorically exclude gun possessors from eligibility for the RDAP sentence reduction), *and*
- are not otherwise ineligible for the RDAP sentence reduction (i.e., no prior violent crimes).

*Arrington* gives a remedy to prisoners in the Ninth Circuit who

- have completed the RDAP,
- were denied the RDAP sentence reduction because their current offense is for violations of 18 U.S.C. § 922 or 21 U.S.C. §§ 841, 843, or 846 and involved a gun,
- are not otherwise ineligible for the RDAP sentence reduction (i.e., no prior violent crimes), *and*
- applied to the RDAP before March 16, 2009, when the new BOP rules went into effect.

If you fit into either of the lists above, you should file an "Administrative Remedies Request" or "COP-OUT" form to seek an earlier release date. If your request is denied, you can appeal it. When all your appeals within the BOP are denied, you can file a lawsuit in federal district court in the district where you are incarcerated. Always discuss your options with your lawyer.





**Q26: I'm not incarcerated in the Ninth Circuit. What do *Paulsen* and *Arrington* do for me?**

A: Nothing right now. *Paulsen* and *Arrington* affect inmates in the Ninth Circuit only (Arizona, California, Idaho, Montana, Nevada, Oregon, or Washington). However, *Paulsen*- and *Arrington*-type legal arguments will probably be the subject of future litigation in all the circuits, and these two cases could be adopted and followed elsewhere. Prisoners should talk to a lawyer about the law that applies in the circuit where they are incarcerated.

**Q27: Do *Paulsen* and *Arrington* help prisoners serving time for a § 924(c) offense?**

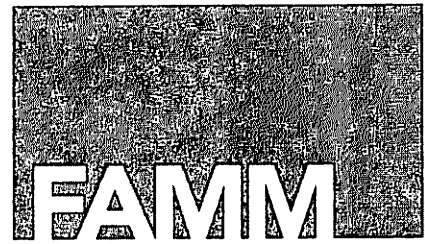
A: No. Prisoners with 18 U.S.C. § 924(c) convictions who are denied the one-year reduction have no recourse under *Paulsen* or *Arrington*, because those rulings were limited to the consideration of 18 U.S.C. § 922(g) convictions and 21 U.S.C. §§ 841 or 846 convictions with two-point gun enhancements. Additionally, a § 924(c) conviction is included in the BOP's list of "crimes of violence," see BOP Program Statement # 5162.05, which is still valid after *Paulsen* and *Arrington*. Even under the BOP's 2009 rules, those convicted of a § 924(c) offense are still not likely to be eligible for the RDAP sentence reduction, because a § 924(c) conviction, by definition, involves "the carrying, possession, or use of a firearm."

**Q28: Under the 2009 rules, what kinds of prior convictions will make a person ineligible for the RDAP sentence reduction?**

A: Under the BOP's 2009 rules, prisoners with prior felony or misdemeanor convictions for homicide, forcible rape, robbery, arson, kidnapping, aggravated assault, or child sexual abuse offenses cannot receive the RDAP sentence reduction. This list of crimes is the same as the list of crimes covered by the FBI's Uniform Crime Reporting Program (UCR), a list generally considered to include crimes that are violent in nature.

***Crickon***

On August 25, 2009, the Ninth Circuit Court of Appeals issued an important ruling regarding whether the BOP can deny the RDAP sentence reduction to anyone who has a prior conviction for a violent offense. *Crickon v. Thomas*, 579 F.3d 978 (9th Cir. Aug. 25, 2009), struck down the BOP's final rule issued in 2000 (the same rule struck down in *Arrington*, see above). The BOP's 2000 rule, just like the 2009 rules, made all offenders with prior convictions for "homicide, forcible rape, robbery, or aggravated assault, or child sexual abuse offenses" ineligible to receive the RDAP sentence reduction. Jerry Crickon, an inmate serving a methamphetamine sentence at FPC Sheridan, completed the RDAP but was told he could not receive the RDAP sentence reduction. According to the BOP, Crickon's conviction for voluntary manslaughter in 1970 – nearly 40 years before Crickon participated in the RDAP – was a violent offense that made him ineligible for the RDAP sentence reduction. Just as it had in *Arrington*, the Ninth Circuit found that when the BOP created its 2000 final rule, it did not provide a clear and rational basis in the administrative record for denying the RDAP sentence reduction to everyone with a prior conviction for a violent offense. This failure made the BOP's 2000 rule "arbitrary and capricious." The court struck down the 2000 rule. In *Crickon*, the court also found that the BOP's interim rules created in 1995 and 1997 were also "arbitrary and capricious." Thus, in the 1995, 1997, and 2000 rules, the BOP did not justify its decision to deny the RDAP sentence



reduction to people with prior convictions for violent offenses. Because all of these BOP rules were invalid, the court ordered the BOP to reconsider Crickon's eligibility for the RDAP sentence reduction without any regard for his prior conviction for voluntary manslaughter.

The 2009 rules, just like the rule struck down in *Crickon*, prohibit people with prior convictions for violent offenses from receiving the RDAP sentence reduction. Because of *Crickon*, these 2009 rules may become the subject of future litigation.

Finally, in the Ninth Circuit, there have been a few successful legal cases challenging whether certain prior convictions met the FBI's definition of "violent" and therefore made a person ineligible for the RDAP sentence reduction. If a person has a prior conviction for an offense that is not deemed "violent" by the FBI's Violent Crime Index, the BOP cannot find a person ineligible for the RDAP reduction on the basis of that offense, *even if the state where the conviction occurred did classify the offense as violent*. Prisoners in the Ninth Circuit have successfully challenged the BOP's denial of their eligibility for the RDAP sentence reduction on these grounds. *See Byrd v. Crabtree*, 22 F. Supp. 2d 1128 (D. Or. 1998) (granting Byrd a sentence reduction despite his prior Washington state conviction for second degree assault, because that offense did not fall within the FBI's definition of aggravated assault), *Torres v. Hood*, 2000 WL 1132112 (D. Or. June 28, 2000) (granting Torres a sentence reduction despite his prior California state convictions for assault with a deadly weapon and assault with force likely to produce great bodily harm, because those offenses did not fall within the FBI's definition of aggravated assault).

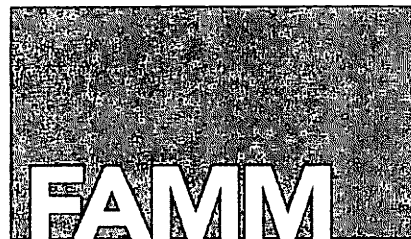
**Q29: I'm incarcerated in the Ninth Circuit. What does *Crickon* do to help me?**

**A:** *Crickon* is only binding in the Ninth Circuit (Arizona, California, Idaho, Montana, Nevada, Oregon, or Washington).

*Crickon* gives a remedy to prisoners in the Ninth Circuit who have been denied the RDAP sentence reduction if they:

- applied to the RDAP before March 16, 2009, when the BOP's 2009 rules went into effect,
- were denied the RDAP sentence reduction because they have prior convictions for violent crimes, including homicide, forcible rape, robbery, or aggravated assault, or child sexual abuse offenses, *and*
- are not otherwise ineligible for the RDAP sentence reduction.

If you fit into the list above, you should file an "Administrative Remedies Request" or "COP-OUT" form to seek an earlier release date. If your request is denied, you can appeal it. When all your appeals within the BOP are denied, you can file a lawsuit in federal district court in the district where you are incarcerated. Always discuss your options with your lawyer.



**Q30: I'm not incarcerated in the Ninth Circuit. What does *Crickon* do for me?**

A: Nothing right now. *Crickon* affects inmates in the Ninth circuit only (Arizona, California, Idaho, Montana, Nevada, Oregon, or Washington). However, *Crickon*-type arguments will probably be the subject of future litigation in all the circuits, and *Crickon* could be adopted elsewhere. Prisoners should talk to a lawyer about the law that applies in the circuit where they are incarcerated.

**Q31: Who makes the final decision about how much of a sentence reduction a prisoner gets for completing the RDAP?**

A: This is a multi-step process:

STEP 1. The Drug Abuse Program Coordinator (DAPC) decides whether a prisoner qualifies to participate in the RDAP and whether the prisoner is eligible for the sentence reduction.

- If the prisoner is not eligible, the prisoner will sign a Notice of RDAP Qualification form (BP-A0941) that goes into his central file. PROCESS ENDS.
- If the prisoner is eligible, the DAPC forwards a Request for § 3621(e) Offense Review form and the prisoner's judgment and commitment and presentence investigation report to the Designation and Sentence Computation Center (DSCC). GO TO STEP 2.

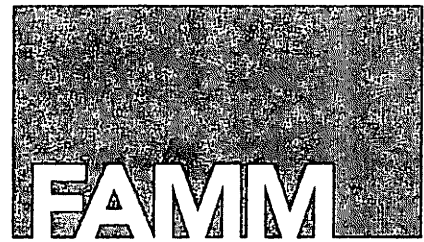
STEP 2. The DSCC's legal staff will review this information and decide, within 30 days, if the prisoner is eligible for a sentence reduction.

If the prisoner is eligible,

- A DSCC attorney signs the Request for § 3621(e) Offense Review form and returns it to the DAPC
- The DAPC notes in SENTRY that the prisoner is eligible for early release
- The prisoner signs the Notice of RDAP Qualification form, which goes to the unit team
- The prisoner must notify the DAPC whether he plans to decline or participate in the RDAP. This decision is noted in SENTRY, and
- Within 15 days of entering the RDAP, the DAPC sends a Notice of § 3621(e) Date form (BP-A0764) to the DSCC, the unit team, and the Correctional Systems Department. Within 15 days of receiving that form, DSCC must calculate a new release date for the prisoner and enter it in SENTRY.

If the prisoner is not eligible,

- A DSCC attorney signs the Request for § 3621(e) Offense Review form and returns it to the DAPC
- The DAPC notes in SENTRY that the prisoner is not eligible for early release
- The prisoner signs the Notice of RDAP Qualification form, which goes to the unit team.



**Q32: How much of a sentence reduction are prisoners likely to receive for completing the RDAP?**

**A:** Beginning on March 16, 2009, the BOP limits sentence reductions based on the length of the sentence imposed by the court, as follows:

<u>If Sentence Length is</u>	<u>Maximum Reduction is</u>
30 months or less	6 months
31-36 months	9 months
37 months or more	12 months

Currently, anyone who completes the RDAP is likely to get less than the full one-year reduction. The average sentence reduction RDAP completers receive is 8 months. This is because the long wait to enter an RDAP means that by the time the prisoner enters and completes the program, he will usually already have less than a year left to serve on his sentence.

**Q33: Is the RDAP the only drug treatment available to federal prisoners?**

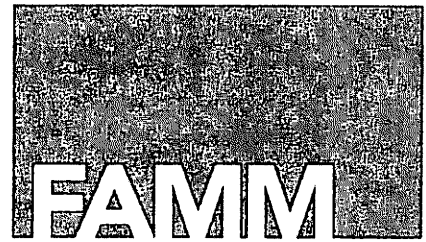
**A:** No. Other, non-residential programs are available. Unlike the RDAP, these programs do not come with sentence reductions, and participants do not have to be relocated to another part of the prison to participate.

- **The drug abuse education course** is provided at all prisons—it is required for some prisoners, but is also open to voluntary participants. Voluntary participants must be approved by the DAPC, and priority is given to prisoners recommended for the program by unit or treatment staff. Fill out form BP-A550 to apply for the course, *available at* <http://www.bop.gov/DataSource/execute/dsFormLoc>. This course is usually taken within the first year of a person’s sentence.
- **The non-residential drug abuse treatment program** is a voluntary 12 to 24-week program provided at all prisons and involves individual and group counseling.
- **Other programs** such as Alcoholics Anonymous (AA), Narcotics Anonymous (NA), and Rational Recovery (RR) may be offered as part of a prison’s drug programs. These programs won’t necessarily be at every prison, and they are non-residential.

**LEGAL DISCLAIMER:**

FAMM cannot provide legal advice, representation, referrals, or guidance to those who need legal help. Nothing on this form is intended to be legal advice or should be relied on as legal advice. Finally, BOP rules and case law change frequently. If you or your loved one feels that you need legal advice, you should consult with an attorney or a law library.

5/3/12



---

<sup>1</sup> Previously, the BOP had excluded people from the RDAP for being in “sustained remission” based on the date the person was *incarcerated*, not the date the person was *arrested*. This led to a court split. Dating “sustained remission” from the date of incarceration becomes problematic whenever a person is arrested, is released pending trial, and is required by a court order to stay sober during that time. If the person obeyed the court and stayed clean for at least a year before going to prison, some courts held that the BOP could later use this sobriety as a reason for preventing that person from enrolling in the RDAP. See *Dellarciprete v. Gutierrez*, 479 F.Supp.2d 600 (N.D.W.Va. 2007); *Laws v. Barron*, 348 F.Supp.2d 795 (E.D.Ky. 2004); *Rosenfeld v. Samuels*, 2008 WL 819630 (D.N.J. Mar. 26, 2008) (unpublished op.); *Wells v. Rivera*, 2007 WL 4219002 (N.D.Fl. Nov. 28, 2007) (unpublished op.); *Rea v. Sniezek*, 2007 WL 427038 (N.D. Ohio Feb. 2, 2007) (unpublished op.); *Shew v. FCI Beckley*, 2006 WL 3456691 (S.D.W.Va. Sept. 19, 2006) (unpublished op.); *Montilla v. Nash*, 2006 WL 1806414 (D.N.J. June 28, 2006) (unpublished op.); *Goren v. Apker*, 2006 WL 1062904 (S.D.N.Y. Apr. 20, 2006) (unpublished op.). Other courts ruled that, in these circumstances, the BOP could not bar a person from the RDAP, particularly because past versions of the BOP’s own regulations and program statements regarding RDAP eligibility did not explicitly list “sustained remission” as a ground for excluding someone from the RDAP. See *Salvador-Orta v. Daniels*, 531 F.Supp.2d 1249 (D.Or. 2008); see also *Smith v. Vazquez*, 491 F.Supp.2d 1165, 1167 (S.D.Ga. 2007); *Mitchell v. Andrews*, 235 F.Supp.2d 1085 (E.D.Cal. 2001). FAMM does not know how courts will rule on sustained remission now that the BOP has mentioned it explicitly in the new rules that went into effect on March 16, 2009. Now that the BOP measures sustained remission from the date of *arrest*, not the date a person goes to prison, fewer people may be excluded from the RDAP because they are found to be in sustained remission. Prisoners who are concerned about RDAP eligibility because of the sustained remission issue should speak with their attorneys.

<sup>2</sup> A “crime of violence” is a felony that (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. 18 U.S.C. § 924(C) (2012).

## RESIDENTIAL DRUG TREATMENT PROGRAM LOCATIONS

---

### NORTHEAST REGION

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

### NORTH CENTRAL REGION

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

### SOUTHEAST REGION

FCI Coleman (FL)  
 USP Coleman II (FL)  
 FPC Edgefield (SC)  
 FCI Jesup (GA)  
 FCI Marianna (FL)  
 FPC Miami (FL)  
 FCI Miami (FL) †  
 FPC Montgomery (AL)  
 FPC Pensacola (FL)  
 FCI Talladega (AL)  
 FCI Tallahassee (FL) \*  
 FCI Yazoo City (MS)

---

### MID-ATLANTIC REGION

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

### SOUTH CENTRAL REGION

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

### WESTERN REGION

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

### CONTRACT FACILITY

RCI Rivers (NC)

### KEY

FCI = Federal Correctional Institution

FMC = Federal Medical Center

FPC = Federal Prison Camp

FSL = Federal Satellite Low

MCFP = Medical Center for Federal Prisoners

USP = United States Penitentiary

RCI = Rivers Correctional Institution

\* = Female Facility

★ = Co-Occurring Disorder Program

† = Spanish

---

**workers may come to the institution in appropriate cases to interview and counsel an inmate.**

Social work staff must establish a liaison with the welfare agency or its equivalent and ensure that this agency receives advance notice of the intended child placement to allow sufficient time for their investigation of potential home sites for the child.

Social workers also meet with the inmate to provide information regarding Bureau programs for pregnant females. These programs include Mothers and Infants Together (MINT) and the Residential Parenting Program (RPP). The social worker documents this informational contact in the Electronic Medical Record and notifies the Female Offender Branch Administrator, Regional Social Worker, and institution Clinical Director of any inmate wishing to participate in either program.

Administrative discretion is used in deciding to pay for immediate post-natal care of an inmate's child while in custody when the Bureau finds itself responsible for the cost by default (no other resources can be compelled to pay). It is reasonable that the Bureau provides for the child's medical expenses for the first three days after routine vaginal birth or up to seven days for a Caesarean section.

Prior to the birth, the mother must make arrangements for a custodian to take care of the child. At this time, the CEO ensures the person or agency taking custody of the child is also asked to be responsible for medical care costs beyond three days after birth. (Note: This may be extended by the Regional Director for an additional seven days for extenuating circumstances on a case-by-case basis.) The person(s) receiving custody of the child should sign a Statement of Responsibility for medical care costs, clearly indicating that the signing party accepts financial responsibility. Unit Management advises the inmate to obtain the statement while the inmate is still in the institution. Unit Management will then forward copies to the Health Services Administrator (HSA) for placement in the HSA's outside hospitalization file, and to the Business Office.

## **8. MOTHERS AND INFANTS TOGETHER (MINT) PROGRAM**

MINT is a residential program promoting bonding skills for pregnant inmates. The inmate resides with the child at all times inside a contract Residential Reentry Center (RRC). Female inmates are eligible to enter the program at the RRC generally during their last two months of pregnancy. After birth, the mother is allowed at least three additional months to bond with the child, although a minimum of six months is recommended. The mother is then returned to an institution to complete her sentence, if necessary. If she is eligible for prerelease services, she may remain at that facility only if she is going to be supervised in that judicial district.

The CEO may approve early or extended placements with a recommendation by the treating obstetrician and Clinical Director's concurrence. A placement extending beyond 180 days requires the Regional Director's approval. The Assistant Directors of Health Services and Reentry Services are advised of these placement approvals and denials. Direct court commitments have a secondary designation noted on the Inmate Load and Security Designation form (BP-A0337). This is used to determine the institution responsible for the inmate's medical expenses while she is confined in the MINT Program.

Health Services staff confirm an inmate's pregnancy and evaluate her medical condition. For inmates not yet in custody, reviews are conducted before arrival whenever possible to allow the inmate to go straight to a MINT site. Health Services staff indicate whether RRC placement is medically appropriate and document this on the Medical/Psychological Pre-Release Evaluation (BP-A0351), which is forwarded to Unit Management. Unit Management expeditiously completes the referral and forwards to the Residential Reentry Management Branch for consideration. When Unit Management has concerns regarding the appropriateness of such a placement, procedures are followed according to Section 10.i (2) of the Program Statement **Community Corrections Center (CCC) Utilization and Transfer Procedures**. Additional guidance on RRC placement concerns is located in that Program Statement. When a pregnant inmate is determined not medically appropriate for placement, the Female Offender Branch must be notified.

To qualify for the program, inmates must be pregnant upon commitment, with an expected delivery prior to release. The inmate or guardian must assume financial responsibility for the child's care, medical and support, while residing at the RRC. Should the inmate or the guardian be unable or unwilling to bear the child's financial cost, the inmate may be transferred back to her parent institution. An inmate who becomes pregnant while on furlough, has more than five years remaining to serve on her sentence(s), or plans to place her baby up for adoption must not be referred for MINT placement.

Referrals should state a specific date of placement approximately two months prior to the inmate's expected delivery date.

The RRC's Terminal Report should fully describe the inmate's experience in, and reaction to, the MINT Program. It should also summarize counseling received in the program and include medical or program recommendations for the institution to facilitate the inmate's transition.

Inmates in need of foster care placement assistance are referred to the institution social worker, or, if the institution does not have a social worker, the regional social worker, who should facilitate community assistance.



## USCS Fed Rules Crim Proc R 32

Current through changes received January 5, 2021.

*USCS Federal Rules Annotated > Federal Rules of Criminal Procedure > Title VII. Post-Conviction Procedures*

### **Rule 32. Sentencing and Judgment**

---

**(a) [Reserved]**

**(b) Time of Sentencing.**

**(1)***In General.* The court must impose sentence without unnecessary delay.

**(2)***Changing Time Limits.* The court may, for good cause, change any time limits prescribed in this rule.

**(c) Presentence Investigation.**

**(1)***Required Investigation.*

**(A)***In General.* The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence unless:

**(i)** [18 U.S.C. § 3593\(c\)](#) or another statute requires otherwise; or

**(ii)** the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under [18 U.S.C. § 3553](#), and the court explains its finding on the record.

**(B)***Restitution.* If the law permits restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution.

**(2)***Interviewing the Defendant.* The probation officer who interviews a defendant as part of a presentence investigation must, on request, give the defendant's attorney notice and a reasonable opportunity to attend the interview.

**(d) Presentence Report.**

**(1)***Applying the Advisory Sentencing Guidelines.* The presentence report must:

**(A)** identify all applicable guidelines and policy statements of the Sentencing Commission;

**(B)** calculate the defendant's offense level and criminal history category;

**(C)** state the resulting sentencing range and kinds of sentences available;

**(D)** identify any factor relevant to:

**(i)** the appropriate kind of sentence, or

**(ii)** the appropriate sentence within the applicable sentencing range; and

(E) identify any basis for departing from the applicable sentencing range.

(2) *Additional Information.* The presentence report must also contain the following:

(A) the defendant's history and characteristics, including:

(i) any prior criminal record;

(ii) the defendant's financial condition; and

(iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;

(B) information that assesses any financial, social, psychological, and medical impact on any victim;

(C) when appropriate, the nature and extent of nonprison programs and resources available to the defendant;

(D) when the law provides for restitution, information sufficient for a restitution order;

(E) if the court orders a study under [18 U.S.C. § 3552\(b\)](#), any resulting report and recommendation;

(F) a statement of whether the government seeks forfeiture under Rule 32.2 and any other law; and

(G) any other information that the court requires, including information relevant to the factors under [18 U.S.C. § 3553\(a\)](#).

(3) *Exclusions.* The presentence report must exclude the following:

(A) any diagnoses that, if disclosed, might seriously disrupt a rehabilitation program;

(B) any sources of information obtained upon a promise of confidentiality; and

(C) any other information that, if disclosed, might result in physical or other harm to the defendant or others.

**(e) Disclosing the Report and Recommendation.**

(1) *Time to Disclose.* Unless the defendant has consented in writing, the probation officer must not submit a presentence report to the court or disclose its contents to anyone until the defendant has pleaded guilty or nolo contendere, or has been found guilty.

(2) *Minimum Required Notice.* The probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period.

(3) *Sentence Recommendation.* By local rule or by order in a case, the court may direct the probation officer not to disclose to anyone other than the court the officer's recommendation on the sentence.

**(f) Objecting to the Report.**

(1) *Time to Object.* Within 14 days after receiving the presentence report, the parties must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report.

**(2) *Serving Objections.*** An objecting party must provide a copy of its objections to the opposing party and to the probation officer.

**(3) *Action on Objections.*** After receiving objections, the probation officer may meet with the parties to discuss the objections. The probation officer may then investigate further and revise the presentence report as appropriate.

**(g) *Submitting the Report.*** At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer's comments on them.

**(h) *Notice of Possible Departure From Sentencing Guidelines.*** Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure.

**(i) *Sentencing.***

**(1) *In General.*** At sentencing, the court:

**(A)** must verify that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report;

**(B)** must give to the defendant and an attorney for the government a written summary of—or summarize in camera—any information excluded from the presentence report under Rule 32(d)(3) on which the court will rely in sentencing, and give them a reasonable opportunity to comment on that information;

**(C)** must allow the parties' attorneys to comment on the probation officer's determinations and other matters relating to an appropriate sentence; and

**(D)** may, for good cause, allow a party to make a new objection at any time before sentence is imposed.

**(2) *Introducing Evidence; Producing a Statement.*** The court may permit the parties to introduce evidence on the objections. If a witness testifies at sentencing, Rule 26.2(a)–(d) and (f) applies. If a party fails to comply with a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony.

**(3) *Court Determinations.*** At sentencing, the court:

**(A)** may accept any undisputed portion of the presentence report as a finding of fact;

**(B)** must—for any disputed portion of the presentence report or other controverted matter—rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing; and

**(C)** must append a copy of the court's determinations under this rule to any copy of the presentence report made available to the Bureau of Prisons.

**(4) *Opportunity to Speak.***

**(A) *By a Party.*** Before imposing sentence, the court must:

**(i)** provide the defendant's attorney an opportunity to speak on the defendant's behalf;

(ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence; and

(iii) provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney.

(B) By a Victim. Before imposing sentence, the court must address any victim of the crime who is present at sentencing and must permit the victim to be reasonably heard.

(C) In Camera Proceedings. Upon a party's motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4).

#### **(j) Defendant's Right to Appeal.**

##### **(1) Advice of a Right to Appeal.**

(A) Appealing a Conviction. If the defendant pleaded not guilty and was convicted, after sentencing the court must advise the defendant of the right to appeal the conviction.

(B) Appealing a Sentence. After sentencing—regardless of the defendant's plea—the court must advise the defendant of any right to appeal the sentence.

(C) Appeal Costs. The court must advise a defendant who is unable to pay appeal costs of the right to ask for permission to appeal in forma pauperis.

(2) Clerk's Filing of Notice. If the defendant so requests, the clerk must immediately prepare and file a notice of appeal on the defendant's behalf.

#### **(k) Judgment.**

(1) *In General.* In the judgment of conviction, the court must set forth the plea, the jury verdict or the court's findings, the adjudication, and the sentence. If the defendant is found not guilty or is otherwise entitled to be discharged, the court must so order. The judge must sign the judgment, and the clerk must enter it.

(2) *Criminal Forfeiture.* Forfeiture procedures are governed by Rule 32.2.

## **History**

---

Dec. 26, 1944, eff. March 21, 1946, as amended Feb. 28, 1966, eff. July 1, 1966; April 24, 1972, eff. Oct. 1, 1972; April 22, 1974, eff. Dec. 1, 1975; Act July 31, 1975, [P. L. 94-64](#), §§ 2, 3(31)–(34), [89 Stat. 370](#), 376, eff. Dec. 1, 1975; April 30, 1979, eff. Dec. 1, 1980, as provided by Act July 31, 1979, [P. L. 96-42](#), § 1(1), [93 Stat. 326](#); Oct. 12, 1982, [P. L. 97-291](#), § 3, [96 Stat. 1249](#), eff. Oct. 12, 1982; April 28, 1983, eff. Aug. 1, 1983; Oct. 12, 1984, [P. L. 98-473](#), Title II, Ch II, § 215(a), [98 Stat. 2014](#), eff. Nov. 1, 1987; Nov. 10, 1986, [P. L. 99-646](#), § 25(a), [100 Stat. 3597](#); March 9, 1987, eff. Aug. 1, 1987; April 25, 1989, eff. Dec. 1, 1989; April 30, 1991, eff. Dec. 1, 1991; April 22, 1993, eff. Dec. 1, 1993; April 29, 1994, eff. Dec. 1, 1994; Sept. 13, 1994, [P. L. 103-322](#), Title XXIII, Subtitle A, § 230101(a), (b), [108 Stat. 2077](#); April 23, 1996, eff. Dec. 1, 1996; April 24, 1996, [P. L. 104-132](#), Title II, Subtitle A, § 207(a), [110 Stat. 1236](#); April 17, 2000, eff. Dec. 1, 2000; April 29, 2002, eff. Dec. 1, 2002; April 30, 2007, eff. Dec. 1, 2007; April 23, 2008, eff. Dec. 1, 2008; March 26, 2009, eff. Dec. 1, 2009; April 26, 2011, eff. Dec. 1, 2011.

USCS Federal Rules Annotated  
Copyright © 2021 Matthew Bender & Company, Inc.  
a member of the LexisNexis Group (TM)  
All rights reserved. All rights reserved.

---

End of Document

## Criminal Rule 30.1 Jury Instructions

- a. **Proposed Instructions.** In all jury trials, counsel for the government and for each defendant must serve and file proposed written instructions prior to the beginning of trial. Copies must be provided for the trial judge and adverse counsel. Each requested instruction must be numbered, indicated which party presents it, and cite the source of the instruction together with additional supporting authority.
- b. **Source Identification.** If an instruction is submitted from a recognized book of instructions it must be from the latest edition of the book of instructions (so noted at the bottom of the instructions); and if modified in any way, deleted material must be shown in parentheses and additions must be underscored.
- c. **Objections.** Objections to requested instructions may be made either in writing or orally as time permits. Such objections should normally be accompanied by citation of supporting authority.
- d. **Additional Instructions.** Additional requested instructions and objections may be received by the Court, in its discretion, at any time prior to counsels' arguments to the jury. The Court must in accordance with Rule 30, Fed. R. Crim.P., inform counsel of its proposed action upon the requests prior to their argument.

## Criminal Rule 32.1 Sentence, Judgment and Probation

### a. Presentence Reports

1. **Time for Hearing.** Probation and sentencing hearings will normally be scheduled seventy-seven (77) days (that is, eleven (11) weeks) following the conviction if the conviction occurs on a Monday, or seventy-seven (77) days following the Monday subsequent to the conviction should the conviction not occur on a Monday. If an evidentiary hearing is necessary, a subsequent date and time may be fixed by the sentencing judge. Counsel should check with the trial judge as to whether counsel should have witnesses available on the scheduled sentencing date.
2. **Modification of Schedule.** For good cause shown, the Court may modify the time schedule for sentencing hearing of the filing requirements.
3. **Presentence Report.** The presentence report is to be completed, filed with the Court, and mailed (or made available to defense counsel who make pickup arrangements) thirty-five (35) days (that is, five weeks) prior to the date fixed for the sentencing hearing. It must include the sentencing summary chart following this rule.
4. **Review.** Defense counsel must review the presentence report with the defendant prior to and sufficiently in advance of the time for filing objections and requests for departure other than United States Sentencing Commission, Guidelines Manual, §5K1.1 (5K1.1), if any, so as to meet the deadlines set forth below. In cases where the defendant is acting as his/her own counsel (pro per), service is to be made by mailing a copy of the presentence report to an out-of-custody defendant, with a specific notice attached advising the individual defendant of the filing dates for the filings described in this order which must be filed and served on the Court, U.S. Attorney and Probation Office.

5. **Objections.** Fourteen (14) days prior to the date fixed for the sentencing hearing, all objections, if any, to the presentence report must be filed and served by the government and counsel for the defendant. If the presentence report is not timely filed -- that is, thirty-five (35) days prior to the scheduled sentencing date -- then the defendant and the government must have seventeen (17) days following the actual date on which the presentence report is filed within which to file and serve. Objections should not include arguments for aggravation or leniency, unless based on claimed errors in the presentence report.
6. **Motions for Departure.** Unless otherwise ordered by the Court, any motions for departure (other than 5K1.1) must be filed and served by the moving party no less than fourteen (14) days before the sentencing hearing. The departure motion and supporting memorandum must set forth a summary of the factual and legal bases for the requested departure. Opposition to motions for departure must be filed and served no less than seven (7) days before the sentencing hearing. If no opposition is filed, the departure motion will be deemed unopposed.
7. **Other Matters.** Matters other than objections, motions for departure, and responses to those objections & motions may be addressed in a sentencing memorandum filed and served no less than seven (7) days before the sentencing hearing date. If the parties have executed a written plea agreement, it must be summarized in a sentencing memorandum, and filed no less than seven (7) days *before* the sentencing hearing.
8. **Sentencing Summary Chart.** Counsel must file their completed sentencing summary charts no later than seven (7) days before the sentencing hearing. If the district judge assigned to the case is a district judge from another district sitting in this court by designation, the parties must clearly indicate the name of the visiting judge on their respective sentencing summary chart and file it with the Clerk's Office. The sentencing summary chart must contain all pertinent calculations to summarize counsel's requested analysis of the guidelines application in the case. The Court may promulgate by general order a sentencing summary chart form that it deems appropriate.
9. **Addendum Addressing Objections.** No less than seven (7) days before the scheduled sentencing hearing, the Probation Department must file and serve an addendum addressing all objections, if any, which have been timely filed by any party. Such report may additionally address any departure requests where probation is able to assist the Court further.
10. **Form.** The sentencing date and time must appear on the cover page of any objections, and replies to those objections, to the presentence report, and any sentencing memoranda, in the space opposite the caption below the file number.
11. **Time Line Chart.** Following this rule is a schematic diagram of the procedure delineated in this rule. The purpose of the diagram is to provide pictorial assistance to those involved in the sentencing process. The actual procedures, however, are those specified in the narrative of the Rule, not the diagram.
12. **Late Filings Unacceptable.** All counsel are advised that the filing dates set forth in this rule are critical. Absent a showing of good cause, any late filings by counsel will not be considered by the Court. Log these dates and comply.

## Criminal Rule 44.1 Right to and Assignment of Counsel

## PART B — CAREER OFFENDERS AND CRIMINAL LIVELIHOOD

## §4B1.1. Career Offender

- (a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.
- (b) Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.

OFFENSE STATUTORY MAXIMUM	OFFENSE LEVEL*
(1) Life	<b>37</b>
(2) 25 years or more	<b>34</b>
(3) 20 years or more, but less than 25 years	<b>32</b>
(4) 15 years or more, but less than 20 years	<b>29</b>
(5) 10 years or more, but less than 15 years	<b>24</b>
(6) 5 years or more, but less than 10 years	<b>17</b>
(7) More than 1 year, but less than 5 years	<b>12.</b>

\*If an adjustment from §3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

- (c) If the defendant is convicted of 18 U.S.C. § 924(c) or § 929(a), and the defendant is determined to be a career offender under subsection (a), the applicable guideline range shall be determined as follows:
- (1) If the only count of conviction is 18 U.S.C. § 924(c) or § 929(a), the applicable guideline range shall be determined using the table in subsection (c)(3).
  - (2) In the case of multiple counts of conviction in which at least one of the counts is a conviction other than a conviction for 18 U.S.C. § 924(c) or § 929(a), the guideline range shall be the greater of—
    - (A) the guideline range that results by adding the mandatory minimum consecutive penalty required by the 18 U.S.C. § 924(c) or



## §4B1.1

§ 929(a) count(s) to the minimum and the maximum of the otherwise applicable guideline range determined for the count(s) of conviction other than the 18 U.S.C. § 924(c) or § 929(a) count(s); and

(B) the guideline range determined using the table in subsection (c)(3).

(3) CAREER OFFENDER TABLE FOR 18 U.S.C. § 924(C) OR § 929(A) OFFENDERS

§3E1.1 REDUCTION	GUIDELINE RANGE FOR THE 18 U.S.C. § 924(C) OR § 929(A) COUNT(S)
No reduction	360–life
2-level reduction	292–365
3-level reduction	262–327.

### Commentary

#### Application Notes:

- Definitions.**—“*Crime of violence*,” “*controlled substance offense*,” and “*two prior felony convictions*” are defined in §4B1.2.
- “Offense Statutory Maximum.”**—“*Offense Statutory Maximum*,” for the purposes of this guideline, refers to the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or controlled substance offense, including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant’s prior criminal record (such sentencing enhancement provisions are contained, for example, in 21 U.S.C. § 841(b)(1)(A), (B), (C), and (D)). For example, in a case in which the statutory maximum term of imprisonment under 21 U.S.C. § 841(b)(1)(C) is increased from twenty years to thirty years because the defendant has one or more qualifying prior drug convictions, the “Offense Statutory Maximum” for that defendant for the purposes of this guideline is thirty years and not twenty years. If more than one count of conviction is of a crime of violence or controlled substance offense, use the maximum authorized term of imprisonment for the count that has the greatest offense statutory maximum.
- Application of Subsection (c).**—
  - In General.**—Subsection (c) applies in any case in which the defendant (i) was convicted of violating 18 U.S.C. § 924(c) or § 929(a); and (ii) as a result of that conviction (alone or in addition to another offense of conviction), is determined to be a career offender under §4B1.1(a).
  - Subsection (c)(2).**—To determine the greater guideline range under subsection (c)(2), the court shall use the guideline range with the highest minimum term of imprisonment.
  - “Otherwise Applicable Guideline Range.”**—For purposes of subsection (c)(2)(A), “otherwise applicable guideline range” for the count(s) of conviction other than the 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count(s) is determined as follows:

- (i) If the count(s) of conviction other than the 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count(s) does not qualify the defendant as a career offender, the otherwise applicable guideline range for that count(s) is the guideline range determined using: (I) the Chapter Two and Three offense level for that count(s); and (II) the appropriate criminal history category determined under §§4A1.1 (Criminal History Category) and 4A1.2 (Definitions and Instructions for Computing Criminal History).
  - (ii) If the count(s) of conviction other than the 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count(s) qualifies the defendant as a career offender, the otherwise applicable guideline range for that count(s) is the guideline range determined for that count(s) under §4B1.1(a) and (b).
- (D) **Imposition of Consecutive Term of Imprisonment.**—In a case involving multiple counts, the sentence shall be imposed according to the rules in subsection (e) of §5G1.2 (Sentencing on Multiple Counts of Conviction).
- (E) **Example.**—The following example illustrates the application of subsection (c)(2) in a multiple count situation:

The defendant is convicted of one count of violating 18 U.S.C. § 924(c) for possessing a firearm in furtherance of a drug trafficking offense (5 year mandatory minimum), and one count of violating 21 U.S.C. § 841(b)(1)(B) (5 year mandatory minimum, 40 year statutory maximum). Applying subsection (c)(2)(A), the court determines that the drug count (without regard to the 18 U.S.C. § 924(c) count) qualifies the defendant as a career offender under §4B1.1(a). Under §4B1.1(a), the otherwise applicable guideline range for the drug count is 188–235 months (using offense level 34 (because the statutory maximum for the drug count is 40 years), minus 3 levels for acceptance of responsibility, and criminal history category VI). The court adds 60 months (the minimum required by 18 U.S.C. § 924(c)) to the minimum and the maximum of that range, resulting in a guideline range of 248–295 months. Applying subsection (c)(2)(B), the court then determines the career offender guideline range from the table in subsection (c)(3) is 262–327 months. The range with the greatest minimum, 262–327 months, is used to impose the sentence in accordance with §5G1.2(e).

4. **Departure Provision for State Misdemeanors.**—In a case in which one or both of the defendant’s “two prior felony convictions” is based on an offense that was classified as a misdemeanor at the time of sentencing for the instant federal offense, application of the career offender guideline may result in a guideline range that substantially overrepresents the seriousness of the defendant’s criminal history or substantially overstates the seriousness of the instant offense. In such a case, a downward departure may be warranted without regard to the limitation in §4A1.3(b)(3)(A).

**Background:** Section 994(h) of Title 28, United States Code, mandates that the Commission assure that certain “career” offenders receive a sentence of imprisonment “at or near the maximum term authorized.” Section 4B1.1 implements this directive, with the definition of a career offender tracking in large part the criteria set forth in 28 U.S.C. § 994(h). However, in accord with its general guideline promulgation authority under 28 U.S.C. § 994(a)–(f), and its amendment authority under 28 U.S.C. § 994(o) and (p), the Commission has modified this definition in several respects to focus more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate and to avoid “unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct . . .” 28 U.S.C. § 991(b)(1)(B). The Commission’s refinement of this definition over time is consistent with Congress’s choice of a directive to the Commission rather than a mandatory minimum sentencing statute (“The [Senate Judiciary] Committee believes that such a directive to the Commission will be more effective; the guidelines development process can assure

## §4B1.2

consistent and rational implementation for the Committee’s view that substantial prison terms should be imposed on repeat violent offenders and repeat drug traffickers.” S. Rep. No. 225, 98th Cong., 1st Sess. 175 (1983)).

Subsection (c) provides rules for determining the sentence for career offenders who have been convicted of 18 U.S.C. § 924(c) or § 929(a). The Career Offender Table in subsection (c)(3) provides a sentence at or near the statutory maximum for these offenders by using guideline ranges that correspond to criminal history category VI and offense level 37 (assuming §3E.1.1 (Acceptance of Responsibility) does not apply), offense level 35 (assuming a 2-level reduction under §3E.1.1 applies), and offense level 34 (assuming a 3-level reduction under §3E.1.1 applies).

<i>Historical Note</i>	Effective November 1, 1987. Amended effective January 15, 1988 (amendments 47 and 48); November 1, 1989 (amendments 266 and 267); November 1, 1992 (amendment 459); November 1, 1994 (amendment 506); November 1, 1995 (amendment 528); November 1, 1997 (amendments 546 and 567); November 1, 2002 (amendment 642); November 1, 2011 (amendment 758); August 1, 2016 (amendment 798).
------------------------	--

---

### §4B1.2. Definitions of Terms Used in Section 4B1.1

---

- (a) The term “crime of violence” means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
  - (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
  - (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).
- (b) The term “controlled substance offense” means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.
- (c) The term “two prior felony convictions” means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (*i.e.*, two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*.

## Commentary

### Application Notes:

1. **Definitions.**—For purposes of this guideline—

“*Crime of violence*” and “*controlled substance offense*” include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

“*Forcible sex offense*” includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

“*Extortion*” is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.

Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (21 U.S.C. § 841(c)(1)) is a “controlled substance offense.”

Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (21 U.S.C. § 843(a)(6)) is a “controlled substance offense.”

Maintaining any place for the purpose of facilitating a drug offense (21 U.S.C. § 856) is a “controlled substance offense” if the offense of conviction established that the underlying offense (the offense facilitated) was a “controlled substance offense.”

Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. § 843(b)) is a “controlled substance offense” if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a “controlled substance offense.”

A violation of 18 U.S.C. § 924(c) or § 929(a) is a “crime of violence” or a “controlled substance offense” if the offense of conviction established that the underlying offense was a “crime of violence” or a “controlled substance offense”. (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)

“*Prior felony conviction*” means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.*, a federal conviction for an offense committed prior to the defendant’s eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

2. **Offense of Conviction as Focus of Inquiry.**—Section 4B1.1 (Career Offender) expressly provides that the instant and prior offenses must be crimes of violence or controlled substance offenses of which the defendant was convicted. Therefore, in determining whether an offense is a

### §4B1.3

crime of violence or controlled substance for the purposes of §4B1.1 (Career Offender), the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.

3. **Applicability of §4A1.2.**—The provisions of §4A1.2 (Definitions and Instructions for Computing Criminal History) are applicable to the counting of convictions under §4B1.1.
4. **Upward Departure for Burglary Involving Violence.**—There may be cases in which a burglary involves violence, but does not qualify as a “crime of violence” as defined in §4B1.2(a) and, as a result, the defendant does not receive a higher offense level or higher Criminal History Category that would have applied if the burglary qualified as a “crime of violence.” In such a case, an upward departure may be appropriate.

<i>Historical Note</i>	Effective November 1, 1987. Amended effective January 15, 1988 (amendment 49); November 1, 1989 (amendment 268); November 1, 1991 (amendment 433); November 1, 1992 (amendment 461); November 1, 1995 (amendment 528); November 1, 1997 (amendments 546 and 568); November 1, 2000 (amendment 600); November 1, 2002 (amendments 642 and 646); November 1, 2004 (amendment 674); November 1, 2007 (amendment 709); November 1, 2009 (amendment 736); November 1, 2015 (amendment 795); August 1, 2016 (amendment 798).
------------------------	--

---

### §4B1.3. Criminal Livelihood

---

If the defendant committed an offense as part of a pattern of criminal conduct engaged in as a livelihood, his offense level shall be not less than **13**, unless §3E1.1 (Acceptance of Responsibility) applies, in which event his offense level shall be not less than **11**.

#### Commentary

#### Application Notes:

1. “**Pattern of criminal conduct**” means planned criminal acts occurring over a substantial period of time. Such acts may involve a single course of conduct or independent offenses.
2. “**Engaged in as a livelihood**” means that (A) the defendant derived income from the pattern of criminal conduct that in any twelve-month period exceeded 2,000 times the then existing hourly minimum wage under federal law; and (B) the totality of circumstances shows that such criminal conduct was the defendant’s primary occupation in that twelve-month period (*e.g.*, the defendant engaged in criminal conduct rather than regular, legitimate employment; or the defendant’s legitimate employment was merely a front for the defendant’s criminal conduct).

**Background:** Section 4B1.3 implements 28 U.S.C. § 994(i)(2), which directs the Commission to ensure that the guidelines specify a “substantial term of imprisonment” for a defendant who committed an offense as part of a pattern of criminal conduct from which the defendant derived a substantial portion of the defendant’s income.

<i>Historical Note</i>	Effective November 1, 1987. Amended effective June 15, 1988 (amendment 50); November 1, 1989 (amendment 269); November 1, 1990 (amendment 354); November 1, 2010 (amendment 747).
------------------------	---