NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

October 15, 2004

Office of the General Counsel - Rules Unit
Bureau of Prisons
320 First Street NW
Washington, D.C. 20534

RE: BOP Docket No. 1127-P
Proposed Community Confinement Rule Change

To Whom It May Concern:

The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's 11,000 direct members — and 82 affiliate organizations with another 28,000 members — include private criminal defense lawyers, public defenders, active-duty military defense counsel, law professors and judges committed to preserving fairness within America's criminal justice system.

The placement opportunities for convicted criminal defendants sentenced to terms of imprisonment is a major concern for NACDL's members, as it profoundly affects both our individual clients and their families. Accordingly, NACDL respectfully opposes the proposed modification to the Federal Bureau of Prisons' policies and rules governing the use of Community Corrections Centers as places of imprisonment, either for purposes of direct designation following sentencing or as a placement option for those nearing the end of their time in custody, to the extent the proposal undermines the Bureau's obligations to make individualized, discretionary, prisoner-specific designations.

The notice filed with respect to the proposed community confinement rule change, BOP Docket No. 1127-P, advances several considerations as "most significant." Each of these is addressed in turn herein.

Consistency in Designation

According to the proposal notice:

> [T]he Bureau's system before December 2002, which allowed individualized CCC decisions for each inmate upon initial prison designation, created the possibility

> that it would unintentionally treat similar inmates differently.... These proposed rules promote Congress' goal of eliminating unwarranted disparities in the sentencing and handling of inmates and also eliminate any concern that the Bureau might use community confinement to treat specific inmates leniently.

69 Fed. Reg. 159 (Aug. 18, 2004).

While any policy or practice is subject to the "possibility" that it may be misapplied, we are struck by the absence of any evidence to support then-Deputy Attorney General Larry Thompson's December 2002 memorandum to former Director Kathleen Hawk Sawyer, wrongly suggesting that the BOP was reserving CCCs for white-collar offenders. Indeed, for years, NACDL members requested, with the full knowledge of the U.S. Attorney's Office, judicial recommendations for direct halfway placements, understanding that such recommendations were not binding on the Bureau but subject to informed correctional judgment. See USDOJ-BOP, Judicial Resource Guide to the Federal Bureau of Prisons, 16 (2000) (minimum requirements for direct placement eligibility). Additionally, following the unlawful December 2002 rule change, Bureau spokesperson Judy Garrett stressed that many different classes and groups of federal offenders benefit from direct CCC placements: "There are a lot of drug offenders, single moms and ordinary folks who aren't wealthy people who have benefited from this. It's not just Enron types." Eric Lichtblau, Criticism of Sentencing Plan for White-Collar Criminals, NY Times (Dec. 26, 2002).

The Bureau's proposed rule change undermines its statutory obligation to make prisoner-specific designation determinations. A uniform placement policy is wholly inconsistent with the mandate of 18 U.S.C. § 4081, which compels "an individualized system of discipline, care, and treatment." While 18 U.S.C. § 3621(b) forbids favoritism, it also commands that the BOP consider the history and characteristics of every prisoner, as well as "any statement" from the sentencing court recommending a type of penal or correctional facility as appropriate.

It strains credulity that after more than seven decades of operation, the Bureau of Prisons is unable to avoid systemic placement disparities or can be legitimately troubled about "the possibility" of dissimilar treatment. Compare P.S. 7310.04, Community Corrections Center (CCC) Utilization and Transfer Procedure (Dec. 16, 1998) (CCC is a place of imprisonment under § 3621(b)) with USDOJ-BOP, Legal Resource Guide to the Federal Bureau of Prisons (2003) (refusal to make direct CCC placements due to OLC memorandum). To the extent that real concern exits about unqualified prisoners receiving direct CCC designations, the solution is not a wholesale abandonment of more than 30 years of past practice, but rather a reasoned and appropriate revision to the controlling program statement. See, e.g., P.S. 5390.88, Intensive Confinement Center (ICC) Program, Sec. 8(b) (Nov. 4, 1999) (prohibiting participation by those otherwise qualified prisoners who lack program needs).

Facility Resources

Offering that the Bureau's experience has led to a conclusion "that the resources of CCCs make them particularly well suited as placement options for the final portion of offenders' prison terms," 69 Fed. Reg. 159, the notice provides no basis as to why, now, BOP seeks to depart so substantially from its past "front-end" practice. When informing the federal judiciary of the

discontinuation of the BOP's new direct designation policy, which was implemented in violation of the Bureau's statutory authority and the Administrative Procedure Act's notice and comment requirements, Director Hawk Sawyer couched it not as an institutional decision but as one dictated by the Department of Justice's Office of Legal Counsel, which, on information and belief, has no specialized correctional management experience. K. Hawk Sawyer, Memorandum for Federal Judges (Dec. 20, 2002); but see U.S. Sentencing Commission—USDOJ-BOP, Joint Report to Congress: Maximum Utilization of Prisons Resources at 9-10 (June 30, 1994) (discussing, with approval, CCCs' direct placement and pre-release program components). Moreover, a suit filed by one of the Bureau's largest CCC contract providers contradicts the notion that refusing to use CCCs for direct designations is an effective use of resources, since it jeopardizes both contractors' financial viability and prisoner rehabilitation efforts. Dismas Charities, Inc. v. U.S. Dept. of Justice, Federal Bureau of Prisons, 287 F.Supp.2d 741 (W.D.Ky. 2003) (dismissed for standing).

Guidelines Section 5C1.1

The proposed notice recognizes that 18 U.S.C. § 3621(b) obliges the Bureau to account for pertinent Sentencing Commission policy statements, issued pursuant to 28 U.S.C. §994(a)(2), but nonetheless looks to the Federal Sentencing Guidelines, promulgated pursuant to 28 U.S.C. §994(a)(1), for authoritative support, assuming that Congress intended the same. In this, the Notice follows the analysis of the Office of Legal Counsel, which has been widely rejected by courts as illogical and erroneous. Many judicial decisions issued since December 2002, as discussed below, hold exactly the opposite, namely that the Sentencing Guidelines do not control the Bureau's designation authority under 18 U.S.C. § 3621(b). Of note, these cases reject the Bureau's reliance on the same authority it cites now.

In Goldings v. Winn, -- F.3d --, 2004 WL 2005625 (1st Cir., Sept. 9, 2004), the United States Court of Appeals for the First Circuit rebuffed the Bureau's argument that there is case law to support the idea that Guideline Section 5C1.1 excludes CCCs from the definition of "place of imprisonment."

> [A]s (the Bureau of Prisons) appear(s) to recognize in their brief to this court, to the extent that § 3621(b) conflicts with a section of the Sentencing Guidelines, the Guidelines must yield. United States v. LaBonte, 520 U.S. 751, 757, 117 S.Ct. 1673, 137 L.Ed.2d 1001 (1997). Also, as we have recognized, the Guidelines are binding only on the courts. They do not address the BOP's use of its discretion as the custodian of federal prisoners to designate the appropriate place of imprisonment. ... Under § 3621(b), the BOP has discretionary authority to designate any available penal or correctional facility that meets minimum standards of health and habitability as the place of a prisoner's imprisonment, and to transfer a prisoner at any time to such a facility. A community correction center is a correctional facility and therefore may serve as a prisoner's place of imprisonment. 'When as now, the plain language of a statute unambiguously reveals its meaning, and the revealed meaning is not eccentric, courts need not consult other aids to statutory construction.' United States v. Meade, 175 F.3d 215,

> 219 (1st Cir. 1999). Because the intent of Congress is clear in its grant of discretionary authority to the BOP to transfer a prisoner to any available penal or correctional facility, we must give effect to that intent. Chevron, 467 U.S. at 843, 104 S.Ct. 2778. The (BOP's) interpretation of § 3621(b) is contrary to the plain meaning of the statute; it is not entitled to judicial deference. (Emphasis added).

See United States v. Adler, 52 F.3d 20, 21 (2d Cir. 1995) (per curiam) (holding that "imprisonment" at a CCC is permissible, even under Guidelines, when implementing a downward departure); see also Reno v. Koray, 515 U.S. 50 (1995) (pre-trial placement at CCC equal to "official detention" warranting full imprisonment time credit); Culter v. United States, 241 F.Supp.2d 19, 21 (D.D.C. 2003) (before OLC Memorandum, "BOP has never interpreted Sentence Guidelines to preclude halfway house designation"); Joint Report to Congress, supra.

"Resort to the Sentencing Guidelines is no substitute for straightforward statutory interpretation. Although the Sentencing Commission may have created a distinction between 'imprisonment' and 'community confinement,' Congress did not. In such cases, it is the will of Congress, not the comments of the Sentencing Commission, that prevails." Estes v. Federal Bureau of Prisons, 273 F.Supp.2d 1301, 1309 (S.D.Ala. 2003); see Iacaboni v. United States, 251 F.Supp.2d 1015, 1024-36 (D.Mass. 2003) ("DOJ's analysis adopts a curious posture, starting with a corner of the Sentencing Guidelines, then working backwards to the controlling general statute").

It seems clear to us that there is nothing but the unsubstantiated allegations of the Office of Legal Counsel which suggests that the Bureau's traditional placement practices frustrate the Sentencing Commission's policy determinations. 69 Fed. Reg. 159. In any event, if the sentencing court enters a sentencing order that is unlawful, the U.S. Attorney's Office can always appeal it. If the court makes a recommendation that is lawful but inappropriate in the particular prisoner's case, the Bureau need not follow that recommendation. Reliance on Guideline Section 5C1.1 as a justification for a categorical rule, however, is improper.

Deterrent Effect

The final consideration offered by the rule change notice is the proposition that placement at a CCC for more than the final ten percent (10%) of a prisoner's time served does not offer sufficient deterrence against future criminal conduct. 69 Fed. Reg. 159. Given the factors that have long controlled CCC placement decisions, see P.S. 7310.04, supra, NACDL finds it noteworthy that BOP offers no empirical support to corroborate this first-time supposition. As discussed at length above, the use of CCCs for direct designation and pre-release purposes dates back nearly 40 years, and at no time during this period has BOP ever articulated or intimated concerns about deterrence, even as recently as December 2002 or in subsequent legal defenses to the unlawful rule change. It is also ironic that neither the President nor the Attorney General has expressed concern for deterrence over the past year in advocating for the expansion of halfway houses as a tool for offender reentry.

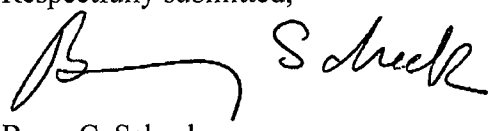
* * *

In conclusion, NACDL submits that the government's recent "settlements" of challenges to the December 2002 rule change merit consideration, as they undermine the confidence any outside party might place in the Bureau's asserted considerations. Twice within the last three months, the

BOP granted petitioners all the relief they were seeking in appeals from adverse decisions on challenges to the 2002 policy change. The Bureau, agreeing to and implementing these settlements, placed the defendants directly into CCCs for service of their entire sentences (something which the December 2002 rule change labels "illegal"), rather than allow either the Sixth or Ninth Circuit Court of Appeals to issue decisions of precedential value comparable to that of Goldings. See Benton v. Ashcroft, No. 03-56343 (9th Cir., settled on eve of argument; voluntary dismissal filed Oct. 1, 2004); United States v. Montgomery, 2004 WL 1562904 (6th Cir., July 14, 2004) (panel notes decisions invalidating new policy; remands for reconsideration of sentence in light of changed policy, and to apply Blakely), vacated, r'hrg en banc granted, 2004 U.S. App.LEXIS 15017 (July 19, 2004), dismissed, 2004 U.S.App. LEXIS 15648 (July 21, 2004) (by stipulation).

For these reasons, NACDL submits that the Bureau of Prisons should revert to its pre-December 2002 Community Corrections Center policy, making only those changes necessary to eliminate unwarranted disparity, while leaving intact the opportunity for placement at any portion, or for all, of a prisoner's sentence based on that prisoner's individual characteristics and needs and taking into account any applicable judicial recommendation.

Respectfully submitted,



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