Earned Time Credits Advocacy

By Michael Santos
August 21, 2022

In mid-August 2022, we received several questions from members of our community. They asked about an article that subscribers of LISA received with the subject line:

"BOP says that for now, some prisoners are too short to be made any shorter."

Based on the number of questions we received from our community, I could see how the article brought anxiety to many people.

After reading the article, I understand why the headline would make people in federal prison anxious. It's easy to overlook the critical qualifying words "for now" in the article's title.

Please keep in mind that the BOP is in a state of flux. Administrators calculate Earned Time Credits differently today from how they will calculate Earned Time Credits in the months ahead.

A person with an imminent release date will not receive the same benefits as someone with a release date that is a year from now. And I anticipate a person projected for release in 2025 will have more mechanisms for relief than a person projected for release in 2022.

During my imprisonment, I saw many reforms that had a slow rollout. Every justice-impacted person would benefit from that historical perspective. That insight may help a person develop more understanding, if not patience.

I cannot say anything to appease people who will spend more time in prison than necessary. I empathize with their anxiety. But timing is everything. Had authorities arrested me a few years earlier, before the War on Drugs began, I would not have spent 26 years in prison. If a person serving a sentence for a white-collar crime would have been arrested in the late 1980s, rather than today, that person would not have received enhancements for "amount of loss," and would have qualified for earlier release on parole.

While serving decades in prison, I learned to accept that we all must live in the world as it exists, and not as we want it to be.

To help, I'll write a historical perspective on some of the more significant prison reforms over the past few decades. That insight may bring perspective. We create resources to help people advocate for themselves more effectively.

The LISA article mentioned the following three cases:

» Dyer v. Fulgam
» Marier v. Bergami
» Stewart v. Snider

Despite citing three cases, the LISA article didn't provide the full context or commentary. People need that information to get better insight. Since Corrlinks limits the number of characters we can send, we'll reproduce this newsletter in PDF format and send it through the mail. But federal prisons also put restrictions on how many pages we can put into an envelope. We cannot print all the case files that we think you need. For that reason, we're producing a new workbook to help members learn how to advocate during this era of the First Step Act.

Previously we produced a paperback workbook titled:

» Journal & Lessons: Daily—Version 1

We're building a series of 12 journal workbooks. Each journal will teach an advocacy concept and provide room for participants to memorialize how they're adjusting in an "extraordinary and compelling" way. Those words have relevance during this era of the First Step Act.

The naming convention for our journal series is simple. We're titling the next two versions as follows:

» Journal & Lessons: Daily—Version 2
» Journal & Lessons: Daily—Version 3

In Journal Version 2—we will include instructions on how to build and develop a release plan. The version will also include a template to follow and a sample release plan—the type that I would have created if I were still in prison. To write this lesson, I hired several subject-matter experts. I interviewed a retired former director of the Bureau of Prisons, a retired former chief of US Probation, and the former administrator of all halfway houses and home confinement programs across the USA.

Each leader gave me a better understanding of how stakeholders rely upon release plans. To paraphrase Zig Zigler, if we help others get what they want, we're more likely to get what we want.

In Journal Version 3—we will include a case study profiling the Dyer-v-Fugham case, the Marier-v-Bergami case, and the Stewart-v-Snider case. The LISA article referenced those cases. Yet without the full context, people could not fully understand the meaning of those decisions and what to expect going forward.

Information isn't a get-out-of-jail-free card, of course. It's simply a resource that a person can use to advocate more effectively.

While climbing through a quarter-century in prison, I learned how confidence comes with more understanding. We can adjust our expectations more effectively if we know how the system operates. To further my commitment to being "the change that I want to see in the world," we do our best to publish that information on our website at Prison Professors, and in paperback to send to people in prison.

For space limitations, we're concluding phase 1 of this newsletter here. In phase 2 of the newsletter, which we'll send in a separate email, we'll describe the Historical Perspective on Sentence and Prison Reform.

Historical Perspective on Sentence and Prison Reform:

THE COMPREHENSIVE CRIME CONTROL ACT OF 1984 AND THE SENTENCE REFORM ACT: 1984/1987

Authorities arrested me on August 11, 1987. Like today, the courts and the prison system were amid major reforms due to the 1984 Sentence Reform Act (SRA).

In 1984, all three branches of government wanted to end sentence disparities. A person in one jurisdiction might get a two-year sentence, while a person in another might get a 20-year sentence for a similar offense. Further, the US Parole Board had discretion on how much time a person would serve in prison and how much time a person would do in the community. In theory, the person with a 20-year sentence under the old law could serve less time in prison than a person serving a two-year sentence.

In response, Congress established the US Sentencing Commission. They came up with the federal sentencing guidelines. Those guidelines changed how judges would sentence, and the Bureau of Prisons would calculate sentences. The SRA abolished the US Parole Board.

The SRA became the "new law," and it applied to anyone charged with a federal crime after November 1, 1987.

The major reform brought years of advocacy efforts and litigation. The new law resulted in people serving far longer in prison and fewer people being released. Prison population levels soared. When I started serving my term, the BOP confined about 30,000 people. Over the next several years, population levels rose to more than 200,000 people.

A series of reforms started to bring those population levels down for the first time in 2014. I always knew those reforms would come, but population levels kept rising while I served my sentence. We were in the era of mass incarceration.

VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994:

President Clinton signed this law, funding more than 100,000 new law-enforcement officers. It also led to the Residential Drug Abuse Program. Since the SRA abolished parole, the RDAP program became the only vehicle in federal prison that would allow a person to work toward advancing a release date administratively.

But in the beginning, it had many problems. Why?

It had problems because it was a new program. Even though the program existed, people couldn't get into the program. It didn't exist in every prison. The BOP had to staff up to accommodate everyone who wanted to benefit from RDAP. It became an enormous problem that took many years to resolve.

Besides the capacity problem, not all administrators granted incentives equally. Many years of advocacy and litigation had to follow to get the program operating as it operates today. The program has changed over time.

If people are in federal prison today and qualify for RDAP, they take it for granted that they will get the time-cut incentive. In the beginning, it did not work that way. Many people served longer sentences because it took a while for the BOP to ramp up.

When reforms work to benefit people in prison, the BOP is slow to implement. When reforms take benefits away from people in prison, both the courts and prison administrators act quickly.

THE PRISON REFORM LITIGATION ACT (PLRA): 1996

The PLRA brought many provisions that made it more difficult for people to advocate for themselves from federal prison. One of those provisions made it far more difficult to file for people in prison to file for relief from a federal court. The PLRA mandated that a person exhaust all administrative remedies before the person could have standing in federal court. Stakeholders would dismiss the case if someone tried to avoid the administrative remedy.

Other provisions of the PLRA burdened people in federal prison. It restricted people from filing cases that challenged conditions of confinement, required people to pay costs for filing claims in court, and it had a "three strikes" provision. If a judge deemed a person's case to be frivolous, the judge could impose a strike. Once a person had three strikes, the PLRA rendered a person ineligible to file future claims as a pro-se litigant.

THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT (AEDPA): 1996

Besides signing the PLRA into law, President Clinton also signed AEDPA. Like the PLRA, AEDPA directly affected people in federal prison.

If a person wanted to pursue relief through habeas corpus, AEDPA required the person to file the habeas petition within 12 months of the date that a conviction became final.

If the Supreme Court refused to hear an appeal or an appeals court affirmed the conviction, the case would become final. The person would only have 12 months to file for relief through habeas corpus, except under stringent conditions. The result is that people in prison lost a mechanism for self-advocacy.

JUDICIAL REFORMS:

For more than a decade, despite the will of Congress, judges held the US Guidelines to be mandatory. People didn't have an opportunity to advocate for lower sentences.

Then, the US Supreme Court issued a series of decisions. Those changes empowered judges. With more discretion, the judges could consider the guidelines advisory rather than mandatory. With cases like Ring, Blakely, Booker, and Apprendi, the Supreme Court began to empower people to advocate for themselves at sentencing.

THE SECOND CHANCE ACT:

This law began to open more opportunities for people in federal prison. It authorized the BOP to send people to a halfway house for the final 12 months of the sentence. If a person had a sentence of longer than 60 months, the person could spend the final six months in home confinement. If a person had a sentence of fewer than 60 months, the person could spend the final 10% of the term in home confinement.

THE FIRST STEP ACT:

The First Step Act (FSA) is the most significant piece of prison-sentence reform since the 1984 Comprehensive Crime Control Bill, which gave rise to the US Sentencing Commission and the federal sentencing guidelines. It responds to the many injustices following the nation's commitment to mass incarceration.

The SRA took many years of advocacy and litigation to get to where it is today. Similarly, we should expect many years of advocacy and litigation to resolve the complexities of the First Step Act. Our team at Prison Professors will continue working hard to bring attention to how the BOP should offer policies that align with the will of Congress—to improve outcomes for all justice-impacted people.

Congress recognized that the First Step Act would require many changes in the BOP. From the day I began serving my sentence as federal prisoner number 16377-004, I heard staff members tell me that the system didn't care anything about a person's life after release. They only cared about "the security of the institution." With the First Step Act, Congress gave the BOP a new mandate. It would have to work toward preparing people for law-abiding, contributing lives.

Changes with the FTC require the Bureau to write new policies, reconfigure computer systems, and train staff. Although President Trump signed the legislation into law in December of 2018, people in federal prison would need to wait several years before they would begin getting benefits.

During the first year, Congress required the BOP to develop a new risk assessment and a new needs assessment. In theory, the PATTERN measures a person's likelihood of reoffending. Based on the survey results, BOP staff members should assign courses to lower the risks of further problems with the law and help a person prepare for higher levels of success.

More than 43 months have passed since the president signed the First Step Act. But the BOP has not yet fully implemented all the changes it must make. As people in federal prison know, the agency has not finished a systemic, systematic way to award

Earned-Time Credits.

More on the Earned Time Credits below.

THE CARES ACT

The US Congress or the Supreme Court mandated changes that led to the abovementioned reforms. The CARES Act, on the other hand, is different. Neither Congress nor the US Supreme Court brought the CARES Act into being. Instead, President Trump signed the CARES Act as an executive order in response to the pandemic. President Biden extended the CARES Act.

Reforms such as The First Step Act and the Second Chance Act require an act of Congress or a ruling from the US Supreme Court to change them. We can expect those laws to remain with us for several years.

The president could end the CARES Act with the stroke of a pen.

Although we don't expect the president will end the CARES Act, we're not politicians. We don't know how long the CARES Act will be with us. All we know is that the CARES Act empowers the director of the Bureau of Prisons to transfer people from prison to home confinement.

We also know that, despite several official memorandums and instructions from the Attorney General, some BOP staff members obstruct a person's efforts to transition to home confinement. People in our community have told us that unit managers and case managers misled them into believing that new rules exist that limit application of the CARES Act—but we cannot find any authority for those ostensible new rules.

When this happens, because of the PLRA mentioned earlier, a person must seek relief through the administrative remedy process

The LISA article mentioned the following three cases:

» Dyer v. Fulgam
» Marier v. Bergami
» Stewart v. Snider

Although I trust the leader of LISA does his best to apprise people in prison of changes, it's difficult to get the full context of cases without having access to the entire case.

We cannot send the entire case to people through the Corrlinks system, nor do we have the capacity to send the whole case to all members of the Prison Professors community through the US postal mail. There would be too many pages.

For that reason, we're downloading all the case files from the court filings. We will bind those case filings together with commentary, hoping you'll be able to use it as you decipher the best strategy in the future.

In Dyer v. Fulgam, the petitioner filed a habeas petition with the sentencing court. He claimed that he accrued earned-time credits under the First Step Act that would benefit him. The Respondent to the petition moved to dismiss the petition for a simple reason: the petitioner failed to exhaust his administrative remedies before filing in court.

For this reason, we encourage members of our community to pay close attention to the rules of administrative remedy. We've written about those rules previously. They're available for download from PrisonProfessors.com and in the Code of Federal Regulations, Title 28, Section 542.10.

According to the judge: "The BOP, not this Court, should calculate those credits in the first instance. The judge cites United States v. Cableigh, 75 F.3d 242, 251 (6th Cir. 1996, holding the issue of sentencing credit "is not ripe for review until the Bureau of Prisons has ruled on a defendant's request for credit."

We receive many requests from people that want to skip the administrative remedy process. As shown in the Dyer decision, except in the rarest instances, ignoring the process will only lead to dismissal from the judge. Also, please keep in mind what we wrote about the PLRA earlier—if judges deem too many filings as being "futile," the judge will prohibit a person from filing further motions with the court as a pro-se litigant.

In the case of Marier v. Bergami, participants will learn a great deal. A judge sentenced Marier to 29 months. Marier scored minimum on the PATTERN score, and he participated in numerous Productive Activities and Evidenced Based Recidivism Reduction programs during his time. Like many people in federal prison, Marier suffered because the BOP did not apply his Earned Time Credits.

Marier went through the entire administrative remedy process. Namely, he filed a request for informal resolution. Then he filed a BP-9, a BP-10, and a BP-11, completing the administrative-remedy process.

After properly exhausting his request for administrative remedy, he filed a habeas petition in federal court under Title 28 of the US Code, Section 2241(c)(3). His efforts complied with the Prison Litigation Reform Act.

The US Attorney responded to the motion Marier filed, requesting a dismissal of the petition. The AUSA included a sworn declaration from the Case Management Coordinator at the prison. The Case Management Coordinator declared that she followed the BOP procedure when it came to Earned Time Credits,

The US Attorney also included a sworn declaration from the Chief of the Unit Management section of the Correctional Programs Branch ("CPB"), organized under the Correctional Programs Division ("CPD") in the BOP's Central Office. She wrote that the BOP is working to implement the First Step Act's final rule, but it will take more time. The agency uses "interim procedures" to ensure the timely implementation of the FSA final rule.

The BOP established the interim procedures to prioritize people closest to being eligible for release. Those procedures will remain in place until the BOP completes "an auto-calculation application to BOP's real-time information system (known as SENTRY) and full integration between SENTRY and BOP's case management system (known as INSIGHT).

According to subject-matter experts that Prison Professors hired, the BOP expects to go live with the new system by October. I do not have a crystal ball, but I will keep members of our community apprised when the BOP completes its computer system upgrade.

In the case of Stewart v. Snider, the petitioner had already left prison, and he served his time on Supervised Release. He petitioned the Court to apply ETC credits toward his Supervised Release, and the judge agreed. The Judge ordered the BOP to reevaluate the petitioner's earned credit time at regular intervals not to exceed every 60 days until the implementation of the automated system described above.

SUMMARY:

In phase 1 of this three-phase newsletter, I wrote easy it would be to overlook the qualifying words of LISA's article, titled: "BOP says that for now, some prisoners are too short to be made any shorter."

The keywords are "for now."

Sadly, some people in prison, such as Marier, will not get the same benefit as people with longer projected release dates. Once the BOP completes the automated computer system, the agency will apply ETC credits in real-time. Just as qualified people get 12 months off the sentence for completing RDAP, people will see their release dates advance when they complete approved courses.

Pushing the BOP to do things differently will require advocacy and perhaps litigation. But people must file the appropriate paperwork at the proper time. And it's also crucial for people to build a comprehensive release plan.

I hope that our community finds this information helpful. In the coming weeks, we'll send two workbooks as part of our journal series. First, we must format, and then we must wait for Amazon to publish and distribute. Those journals will include all the case filings for the cases mentioned above. We'll also have commentary.

We hope that the Prison Professors community finds this information helpful.

Sincerely,
Michael Santos

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