



# Earned Time Credits and PATTERN for Defense Attorneys

*Alison Guernsey, University of Iowa Law School*

*Elizabeth Blackwood, NACDL*

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# Section I

## A (Very Brief) First Step Act Refresher



# The First Step Act

- ◆ Expansive federal criminal law reform bill passed Dec 2018 with bipartisan support.
  - ◆ **Sentencing Reforms** (increase fairness in sentencing by reforming punitive sentencing laws)
  - ◆ **Corrections Reforms** (improve prison conditions; reduce recidivism)



# The First Step Act

## Title I-Recidivism Reduction

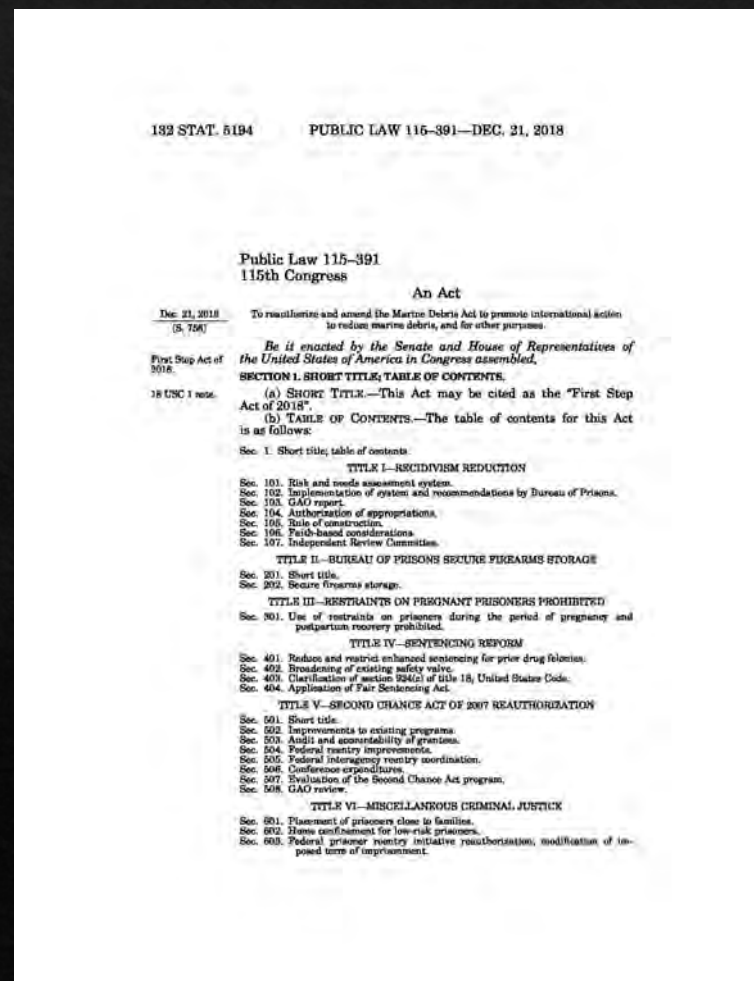
- ◆ Risk and Needs Assessment System (section 101)
- ◆ Earned Time Credit (section 101)

## Title IV-Sentencing Reform

- ◆ Changes to Drug Mandatory Minimums (section 401)
- ◆ Expanded Safety Value (section 402)
- ◆ Changes to § 924(c) for Subsequent Convictions (section 403)
- ◆ Crack Retroactivity (section 404)

## Title VI-Miscellaneous Criminal Justice

- ◆ Reduction in Sentence/Compassionate Release (section 603(b))

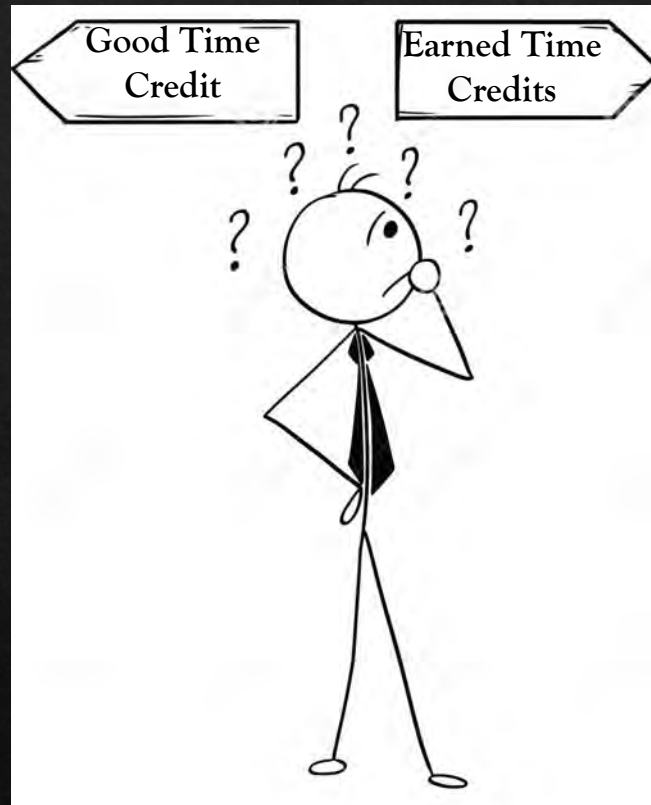




# Note: Good Time Credit vs. Earned Time Credits

## Good Time Credit

- ◆ FSA updated from 13% to 15% (54 days) for sentences over a year
- ◆ Applies across the board unless credits lost due to disciplinary violations



## Earned Time Credits

- ◆ FSA-created program allows eligible individuals to earn credits for successfully participating in programming
- ◆ Credits can be applied towards early release to RRC/HC or supervised release based on PATTERN

score

## Section III

# PATTERN and Needs Assessment



# Risk Assessment + Needs Assessment

- ◇ To earn time credits: must first have a **Risk Assessment** and a **Needs Assessment**
  - ◇ Risk Assessment gives the **PATTERN Score**
  - ◇ Needs Assessment determines the **programming** to take



# PATTERN: Risk assessment tool

- ◇ Prisoner Assessment Tool Targeting Estimated Risk and Needs
- ◇ Algorithm classifies prisoner as having either **minimum**, **low**, **medium** or **high** risk for recidivism.
- ◇ Recidivism = Rearrest or Return to BOP Custody. Not Reconviction.





# Why does PATTERN matter?

- ◇ PATTERN score determines
  - ◇ How many ETC credits you can collect and
  - ◇ If you can apply them for early release.
- ◇ We have also seen PATTERN show up in other areas:
  - ◇ CARES Act Home Confinement
  - ◇ RIS/Compassionate Release



# PATTERN Versions

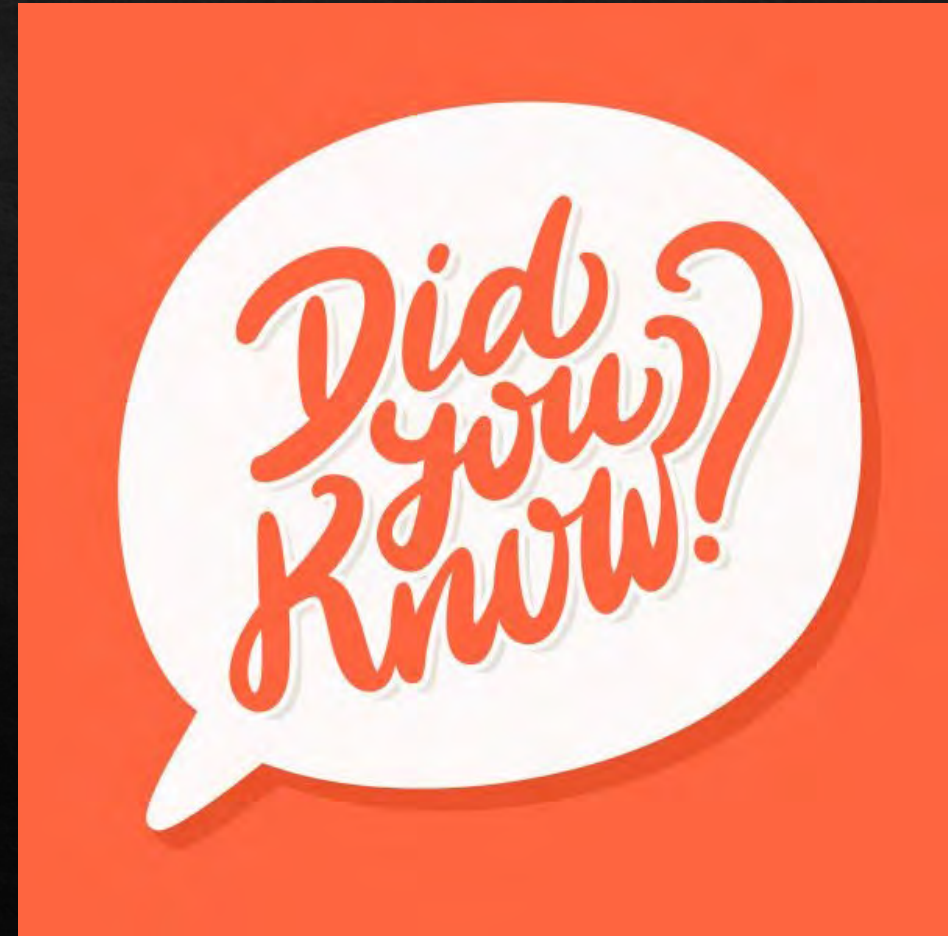


- ◇ April 2022: PATTERN 1.3 Released
  - ◇ 4<sup>th</sup> version. Previously: PATTERN; PATTERN 1.2; PATTERN 1.2-Revised
- ◇ PATTERN 1.3 raises cut-points for general scores allowing for more Minimums and Lows.



# General v. Violent Scores

- ◆ **General** and **Violent** Recidivism Scores
  - ◆ Highest score in either category controls.
- ◆ Reassessments at least annually; sometimes more often.



# Pattern Scoring Sheet

- ◆ PATTERN 1.3
- ◆ Scored using Static and Dynamic Factors
- ◆ People can change dynamic factors over time (programming taken, incident reports, education, work history); but not static factors (age, CH)
- ◆ Age and CH by far have most weight

*BOP Pattern Scores*

*Definitions: NJJ 2021 Review and Revalidation of Pattern*

MALE PATTERN RISK SCORING					
Register Number:		Date:			
Inmate Name:					
MALE RISK ITEM SCORING	CATEGORY	GENERAL SCORE	Enter Score	VIOLENT SCORE	Enter Score
1. Current Age	> 60	0		0	
	51-60	7		4	
	41-50	14		8	
	30-40	21		12	
	26-29	28		16	
	< 26	35		20	
2. Walsh w/Conviction	No	0		0	
	Yes	2		0	
3. Violent Offense (PATTERN)	No	0		0	
	Yes	5		7	
4. Criminal History Points	0 - 1 Points	0		0	
	2 - 3 Points	8		3	
	4 - 6 Points	16		6	
	7 - 9 Points	24		9	
	10 - 12 Points	32		12	
	> 12 Points	40		15	
5. History of Escapes	None	0		0	
	> 10 Years Minor	3		2	
	5 - 10 Years Minor	6		4	
	< 5 Years Minor/Any Serious	9		6	
6. History of Violence	None	0		0	
	> 10 Years Minor	1		2	
	> 15 Years Serious	2		4	
	5 - 10 Years Minor	3		6	
	10 - 15 Years Serious	4		8	
	< 5 Years Minor	5		10	
	5 - 10 Years Serious	6		12	
	< 5 Years Serious	7		14	
7. Education Score	Not Enrolled	0		0	
	Enrolled in GED	-1		-1	
	HS Degree / GED	-2		-2	
8. Drug Program Status	No DAP Completed	0		0	
	NRDAP Complete	-2		-1	
	RDAP Complete	-4		-2	
	No Need	-6		-3	
9. All Incident Reports (120 months)	0	0		0	
	1	1		1	
	2	2		2	
	> 2	3		3	
10. Serious Incident Reports (120 months)	0	0		0	
	1	1		1	
	2	2		2	
	> 2	3		3	
11. Time Since Last Incident Report	12+ months or no incidents	0		0	
	7-12 months	1		1	
	3-6 months	2		2	
	< 3	3		3	
13. FRP Refuse	NO	0		0	
	YES	2		0	
14. Programs Completed	0	0		0	
	1	-3		-1	
	2 - 3	-6		-2	
	4 - 10	-9		-3	
	> 10	-12		-4	
15. Work Programs	0 Programs	0		0	
	1 Program	-1		-1	
	> 1 Program	-2		-2	
Total Score (Sum of Columns)		General:		Violent:	
General/Violent Risk Levels		General:		Violent:	
OVERALL MALE PATTERN RISK LEVEL					



# PATTERN Cut Points

## Cut Points Used for PATTERN v. 1.3

*(used when calculating an inmates risk of recidivism)*

### Male - General

Minimum = 5 or less

Low = 6 to 39

Medium = 40 to 54

High = 55 or more

### Male - Violent

Minimum = 7 or less

Low = 8 to 24

Medium = 25 to 31

High = 32 or more

### Female - General

Minimum = 7 or less

Low = 8 to 38

Medium = 39 to 52

High = 53 or more

### Female - Violent

Minimum = 1 or less

Low = 2 to 11

Medium = 12 to 17

High = 18 or more

# PATTERN Problems

## ◆ Sticky Categories

- ◆ Age and CH given greatest weight; does not allow for personal growth

## ◆ Racial Disparities

- ◆ Over 70% of Black prisoners → Med/High
- ◆ Overpredicts recidivism in Black, Hispanic, Asian people compared to White people.

## ◆ History of Technical Errors

- ◆ Earlier version had 14,000 in wrong category





# Needs Assessment

- ◆ SPARC-13 Survey, PSR
- ◆ Happens at intake (within 28 days of arrival at BOP)
- ◆ Reassessed at least every six months
- ◆ Based on your needs, BOP assigns programming in 13 areas



# Needs Assessment



June 2021

5

- ◇ Anger/Hostility
- ◇ Antisocial Peers
- ◇ Cognitions
- ◇ Education – **PSR**
- ◇ Family/Parenting
- ◇ Finance/Poverty – **PSR**
- ◇ Medical
- ◇ Mental Health
- ◇ Recreation/Leisure/Fitness
- ◇ Substance Abuse – **PSR**
- ◇ Trauma
- ◇ Work – **PSR**
- ◇ Dyslexia



# No Needs Assessment → No ETC

- ◆ Considered “opting out” if refuses to participate in or fails to complete any portion of SPARC-13, the Bureau’s assessment system.

- ◆ *BOP Program Statement, §5410.01*



# Needs Assessment

## Current FSA Assignments

Assignment	Description	Start
FTC INELIG	FTC-INELIGIBLE-REVIEWED	08-26-2020
INELIG AUT	FTC-INELIGIBLE OFF CODE - AUTO	12-17-2019
N-ANGER Y	NEED - ANGER/HOSTILITY YES	01-25-2022
N-ANTISO Y	NEED - ANTISOCIAL PEERS YES	01-25-2022
N-COGNTV Y	NEED - COGNITIONS YES	01-25-2022
N-DYSLEX N	NEED - DYSLEXIA NO	05-28-2021
N-EDUC N	NEED - EDUCATION NO	01-25-2022
N-FIN PV N	NEED - FINANCE/POVERTY NO	01-25-2022
N-FM/PAR N	NEED - FAMILY/PARENTING NO	01-25-2022
N-M HLTH N	NEED - MENTAL HEALTH NO	01-25-2022

Archived as of 02-16-2022

Individualized Needs Plan - Program Review (Inmate Copy)

Page 2 of 4



## Individualized Needs Plan - Program Review (Inmate Copy)

SEQUENCE: 00770668

Dept. of Justice / Federal Bureau of Prisons

Team Date: 01-26-2022

Plan is for inmate: [REDACTED]

Assignment	Description	Start
N-MEDICL N	NEED - MEDICAL NO	01-25-2022
N-RLF Y	NEED - REC/LEISURE/FITNESS YES	01-25-2022
N-SUB AB Y	NEED - SUBSTANCE ABUSE YES	01-25-2022
N-TRAUMA Y	NEED - TRAUMA YES	01-25-2022
N-WORK Y	NEED - WORK YES	01-25-2022
R-LW	LOW RISK RECIDIVISM LEVEL	10-06-2021

### Progress since last review

Due to Covid-19 inmate is unable to enroll in any educational classes due to class size.

### Next Program Review Goals



# Needs Assessment: Programs

## Evidence Based Recidivism Reduction (EBRR) Programs

- ◆ Programs likely to reduce recidivism



## Productive Activities

- ◆ Programs that allow prisoners to remain productive



# Needs Assessment: Programs

- ◆ FSA Approved Programs Guide
  - ◆ Only programs that count
- ◆ 75-page guide; updated often (at least annually)
  - ◆ RDAP, UNICOR and other prison jobs; sex offender treatment; online college; faith-based activities

*FSA Programs Guide, Sept. 2023*

U.S. Department of Justice  
Federal Bureau of Prisons  
Washington, DC

Reentry Services Division

September 2023

## First Step Act Approved Programs Guide





Section IV  
Earned Time Credits

# Earned time credits

- ◇ What are they?
- ◇ Who can get them?
- ◇ How do you get them?
- ◇ What do you earn?
- ◇ How do you cash them in?





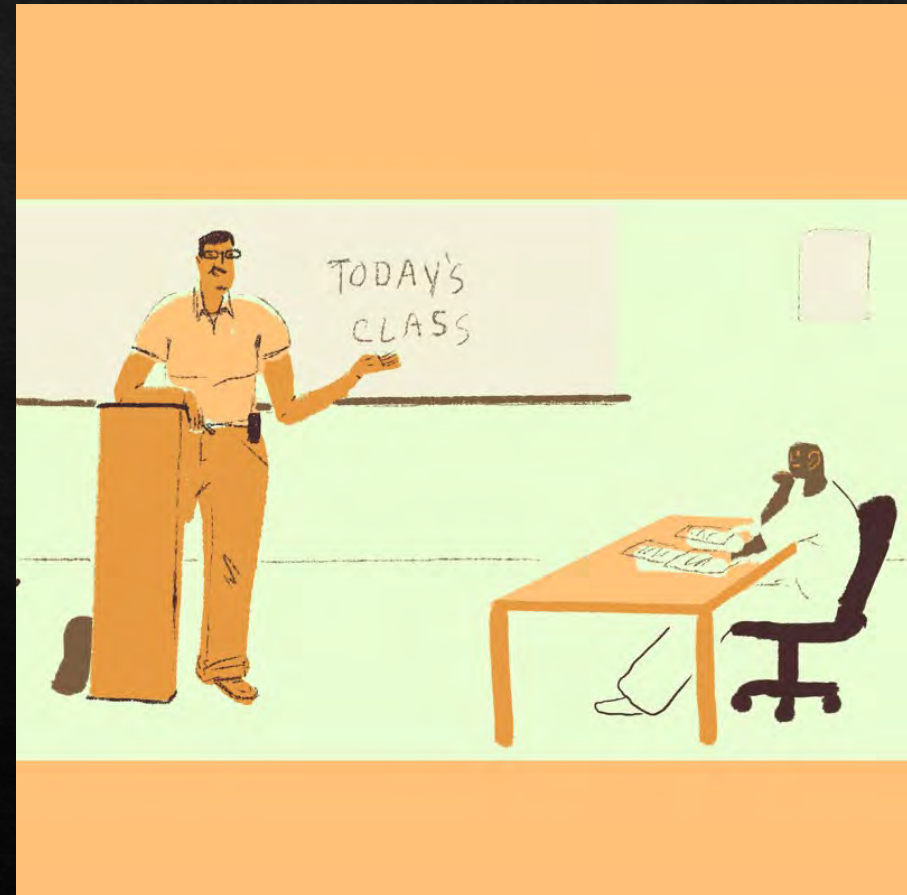


## Earned time credits: *A rose by any other name...*


- ◇ Earned Time Credit
- ◇ ETC
- ◇ FSA Time Credit
- ◇ Time Credits
- ◇ FTC

# Earned time credits: What are they?

- ◆ Time Credits → Early release
- ◆ **Eligible** inmates may earn **time credits** for successfully completing approved evidence-based recidivism-reduction (EBRR) programs and productive activities (PA).







# Earned time credits: Where are they?

- ◇ Statute: First Step Act, Pub. L. No. 115-391 Dec. 21, 2018
- ◇ Rule: DOJ/BOP Rule, 28 C.F.R §523-541 Jan. 15, 2022
- ◇ Policy: BOP Program Stmt. §5410.01 Nov. 18, 2022 (updated twice in 2023)

# Earned time credits: What do you earn if **Eligible**?

## ◆ Supervised Release

- ◆ Min/Low last two assessments (only)
- ◆ Must have a term of supervised release in judgment
- ◆ Release from BOP
- ◆ Maximum: **One Year**

## ◆ Prerelease Custody (RRC or Home Confinement)

- ◆ Min/Low last two assessments (or warden approves)
- ◆ Still in BOP custody
- ◆ No Maximum





# Earned time credits: What do you earn if **Ineligible**?

- ◇ If you are **not eligible** to earn or apply time credits, can still participate in programming for:
  - ◇ Phone and visitation privileges;
  - ◇ Transfer closer to home;
  - ◇ Increased commissary limits; email privileges; preferred housing units, etc.



# Earned time credits: How much do you earn?

- ◇ **Medium or High** → **10 days of credit** for every **30 days** of EBRR or PA.
- ◇ **Minimum or Low** → **15 days** for every **30 days**
  
- ◇ As long as you are eligible, regardless of PATTERN score, can EARN credits
- ◇ Credit for every 30-day period of successful participation
- ◇ Do not have to complete program to earn credit



# Earned time credits: When can you start?

- ◇ FSA: “Date the prisoner’s **sentence commences**”
  - ◇ Pretrial confinement; any prior incarceration **does not count**
- ◇ BOP Rule/BOP P.S. → date individual arrives/surrenders at BOP facility.
  - ◇ BUT at least one court held this to be an “additional exclusion” and amt of time b/t date of sentence and arrival at BOP should count.
    - ◇ *Patel v. Barron* (W.D. Wash. 2023).



18 U.S.C. § 3632(d)(4)(B); 28 C.F.R. § 523.42(a); BOP Program Statement 5401.01

# Earned time credits: Who earns them?



- ◇ In BOP Custody (includes halfway house or HC)
- ◇ **Successfully participating** in EBRR Programs or PAs
- ◇ **Eligible**

*18 U.S.C. §3632(d)(4)(D); BOP Program Statement 5401.01*



# Earned time credits: Successfully Participating

- ◇ Participating in programming recommended by BOP based on needs; complied with all requirements
- ◇ Can earn even if on waitlist for two assessment periods—maybe more.

*BOP Program Statement 5401.01*



# Earned time credits: **Not** Successfully Participating

- ◇ SHU (but Admin Det for safety is ok)
- ◇ Not in BOP (local writ, hospital, furlough)
- ◇ Psych Hold
- ◇ “**Opting out**” or Refusing
  - ◇ Refuse to participate in assigned EBBR/PA
  - ◇ Fail to complete SPARC-13 survey
  - ◇ Must be documented by staff





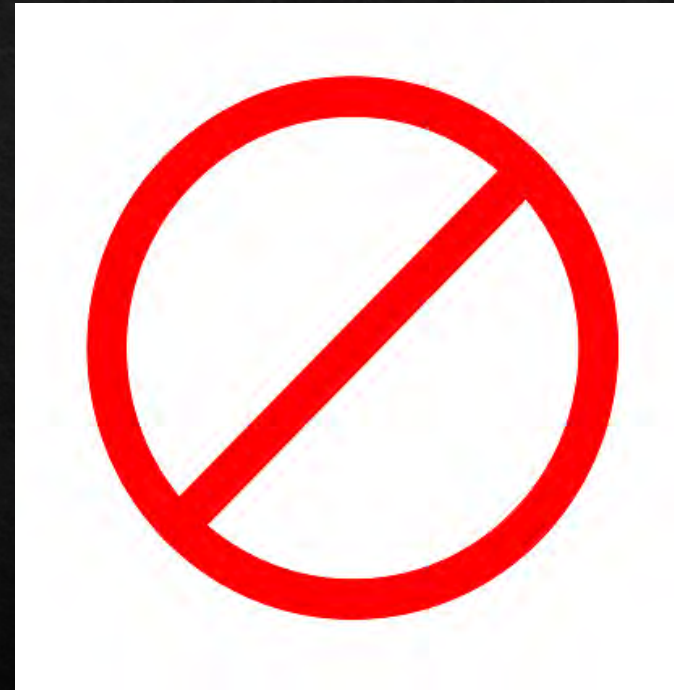
# Earned time credits: Ineligibility

- ◇ Around 43% ineligible as of 4/23
- ◇ A prisoner is ineligible to earn or apply time credits if:
  - ◇ Disqualifying **Current** Conviction
  - ◇ Disqualifying **Prior** Conviction
  - ◇ DC Code Offenders (right now)
- ◇ Can still earn other privileges by taking programming → but availability issues



# Disqualifying Current Convictions

- ◇ Over 60 categories of enumerated ineligible offenses at **18 U.S.C. §3632(d)(4)(D)**
  - ◇ Note: Check specific **subsection**
  - ◇ Note: Some offenses require **court findings** (e.g. drug offense + specific drug + role enhancement)
- ◇ J&C, PSR, SOR





## Ineligible for ETCs

If “serving a sentence for a conviction” under any of the following:

- 18 U.S.C. § 32
- 18 U.S.C. § 33
- 18 U.S.C. § 36
- 18 U.S.C. § 81
- 18 U.S.C. § 111(b)
- 18 U.S.C. § 113(a)(1), (7), (8)
- 18 U.S.C. § 115, except threats
- 18 U.S.C. § 116
- 18 U.S.C. § 117
- Ch. 10 (biological weapons)
- Ch. 11B (chemical weapons)
- 18 U.S.C. § 351
- 18 U.S.C. § 521
- 18 U.S.C. § 751
- 18 U.S.C. § 793
- 18 U.S.C. § 794
- Ch. 39 (explosives), except § 836
- 18 U.S.C. § 842(p) if weapon of mass destruction
- 18 U.S.C. § 844(f)(3), (h), (i)
- 18 U.S.C. § 871
- 18 U.S.C. § 879
- 18 U.S.C. § 924(c)
- 18 U.S.C. § 1030(a)(1)
- 18 U.S.C. § 1091
- Ch. 51 (homicide) except §§ 1112, 1113 (att. manslt.), 1115, 1122
- Ch. 55 (kidnapping)
- Ch. 77 (slavery/peonage) except §§ 1593 – 1596
- 18 U.S.C. § 1751
- 18 U.S.C. § 1791
- 18 U.S.C. § 1792
- 18 U.S.C. § 1841(a)(2)(C)
- 18 U.S.C. § 1992
- 18 U.S.C. § 2113(e)
- 18 U.S.C. § 2118(c)
- 18 U.S.C. § 2119
- Ch. 105 (sabotage) except § 2152
- Ch. 109A (sex abuse)
- 18 U.S.C. § 2250
- 18 U.S.C. § 2251
- 18 U.S.C. § 2251A
- 18 U.S.C. § 2252
- 18 U.S.C. § 2252A
- 18 U.S.C. § 2260
- 18 U.S.C. § 2283
- 18 U.S.C. § 2284
- 18 U.S.C. § 2291 if sub. risk of death/SBI
- Ch. 113B (terrorism)
- 18 U.S.C. § 2340A
- 18 U.S.C. § 2381
- 18 U.S.C. § 2442
- 18 U.S.C. § 3559(c)(2)(F) if +1 year imprisonment and if certain prior convictions
- 42 U.S.C. § 2077(b)
- 42 U.S.C. § 2122
- 42 U.S.C. § 2131
- 42 U.S.C. § 2274
- 42 U.S.C. § 2275
- 42 U.S.C. § 2284
- 49 U.S.C. § 60123(b) if sub. risk of death/SBI
- 21 U.S.C. § 841(b)(1)(A-C) if death/SBI resulted
- 8 U.S.C. § 1326(b)(1), (2)
- 8 U.S.C. § 1327
- 8 U.S.C. § 1328
- 50 U.S.C. § 4611 et seq.
- 50 U.S.C. § 1705
- 50 U.S.C. § 3121
- 21 U.S.C. §§ 841(b)(1)(A)-(B) or 960(b)(1)-(2) if for fentanyl/analogue

### Court-found ineligibilities:

- 21 U.S.C. §§ 841(b)(1)(A)-(B) or 960(b)(1)-(2) if heroin and court finds role enhancement
- 21 U.S.C. §§ 841(b)(1)(A)-(B) or 960(b)(1)-(2) if meth and court finds role enhancement
- 21 U.S.C. §§ 841(b)(1)(A)-(B) or 960(b)(1)-(2) for any drug if court finds offense involved fentanyl/analogue and role enhancement

**Deportable persons:** ineligible to apply time credits if subject to a final order of removal under any provision of the INA

See 18 U.S.C. § 3632(d)(4)(D)-(E)

# ETC Handout

## ◆ Federal Defenders One Pager: Earned Time Credits



# Gun Crimes



## ◇ 18 U.S.C. §924(c)

- ◇ Poss of Firearm in relation to drug trafficking crime or COV

## ◇ 18 U.S.C. §922(g)/ §924(e)

- ◇ Felon in possession/prohibited person in poss of firearm; ACCA





# Robberies



- ◆ 18 U.S.C. §2113(e)

- ◆ Bank robbery resulting in death

- ◆ 18 U.S.C. §2119

- ◆ Carjacking

- ◆ 18 U.S.C. §2113(a) and (d)

- ◆ Armed and unarmed bank robberies

- ◆ 18 U.S.C. §1951

- ◆ Hobbs Act robbery



## Sex Offenses



- ◇ Chapter 109A (sexual abuse)
- ◇ Child Pornography Offenses
- ◇ SORNA

- ◇ 18 U.S.C. §2421, 2422, 2423
  - ◇ Transportation for Prostitution
  - ◇ Coercion and Enticement
  - ◇ Transportation of Minors





# Assaults



## ❖ 18 U.S.C. §113(a)(1), (7), (8)

- ❖ Assault with intent to murder
- ❖ Assault resulting in SBI to domestic partner or minor;
- ❖ Assault of domestic partner by strangling

## ❖ 18 U.S.C. §113(a)(2), (3), (4), (6)

- ❖ Assault with intent to commit a felony
- ❖ Assault with a dangerous weapon and intent to do bodily injury
- ❖ Assault by striking, beating, or wounding
- ❖ Assault resulting in SBI

# Other Notable Exclusions

- ◇ Any drug trafficking §841 offense (b)(1)(A)-(C) resulting in death/SBI
- ◇ 21 U.S.C. §841(b)(1)(A)-(B) or §960(b)(1)-(2) if fentanyl/analogue
- ◇ Some Robberies/Burglaries involving controlled substances §2118(c)
- ◇ Escape
- ◇ Assaulting officer with weapon or resulting in injury, §111(b)
- ◇ Explosives and some types of arson
- ◇ Kidnapping





# Other Notable Exclusions: Court-found Ineligibilities

- ◇ 21 U.S.C. §841(b)(1)(A)-(B) or §960(b)(1)-(2)
  - ◇ If heroin and court finds role enhancement
- ◇ 21 U.S.C. §841(b)(1)(A)-(B) or §960(b)(1)-(2)
  - ◇ If meth and court finds role enhancement
- ◇ 21 U.S.C. §841(b)(1)(A)-(B) or §960(b)(1)-(2)
  - ◇ For any drug if court finds offense involved fentanyl/analogue and role enhancement



# Disqualifying Prior Convictions

- ◆ If instant offense is a violent felony that is not already disqualifying, look-out for:
  - ◆ Current offense is serious violent felony (§3559(c)—3 strikes) > 1 year AND
  - ◆ Prior conviction falls under enumerated list and served > 1 year
    - ◆ E.g., murder, v. manslaughter, kidnaping, carjacking, arson, terrorism.
    - ◆ Must be adult conviction; if state conviction, must match list of federal offenses “element-by-element.”



18 U.S.C. §3632(d)(4)(D); 28 C.F.R. §523; BOP Program Statement §5401.01



# Disqualifying Prior Convictions

- ◇ “Due to the complexity of the prior offense review, questions regarding whether an offense is disqualifying may be referred to an institution’s local Consolidated Legal Center (CLC) for guidance.”



# Deportable persons/detainers

- ◇ Ineligible to **earn** credits:
  - ◇ §1326 (illegal reentry) or §1327 (aiding illegal reentry).
    - ◇ **Disqualifying offenses**
- ◇ Can earn but can't **apply** credits if:
  - ◇ Subject to a final order of removal



*§3632(d)(4)(E); BOP Program Statement §5401.01*



# Deportable persons/detainers: Good news

- ◇ BUT Recent BOP Policy Change in 2023:
  - ◇ Can Earn AND Apply Credits if:
    - ◇ **Unresolved** immigration status
    - ◇ **Unresolved** pending criminal charges/detainers



# Deportable persons/detainers: Bad News

- ◆ BUT does not eliminate the outstanding detainees/pending charges
- ◆ BOP attempting to deter use of ETC for these people, claiming:
  - ◆ At risk of rearrest
  - ◆ If arrested, BOP will lose jurisdiction, interrupt federal sentence; become “technical escape”
- ◆ Reports that BOP not prioritizing bed space for these individuals
- ◆ **Advocates seeking to fix this!**





# Applying Earned Time Credits: When can you cash them in?

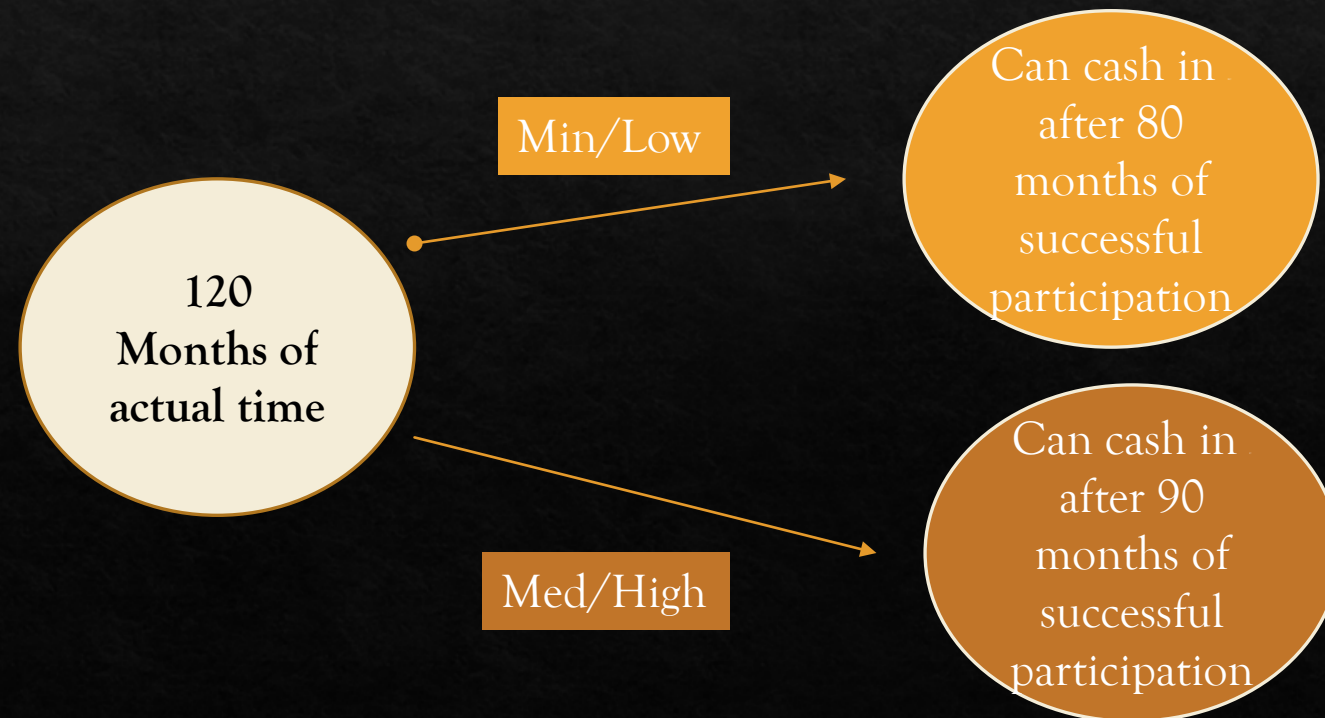
- ◇ When ETC = Time Left on Sentence
- ◇ Min or Low on Last Two Risk Assessments (or Warden approves)

18 U.S.C. § 3624(g); BOP Program Statement §5401.01



# Applying Earned Time Credits: When can you cash them in?

- ◇ 120 months **actual time** in BOP custody (minus GT credit, pre-release custody, RDAP)
  - ◇ If **Min/Low** (15/30), after 80 months → 40 months of ETC/40 months left on sentence
  - ◇ If **Med/High** (10/30), after 90 months → 30 months of ETC/30 months left on sentence





# Applying Earned Time Credits: What about Med/High clients?

- ◆ Prisoner must petition warden
- ◆ Warden → Regional Director
- ◆ Maintain good conduct for 3 years from date of request
- ◆ Complete 1 residential EBBR program in past 5 years, if assigned
- ◆ Otherwise comply with terms of successful program participation.

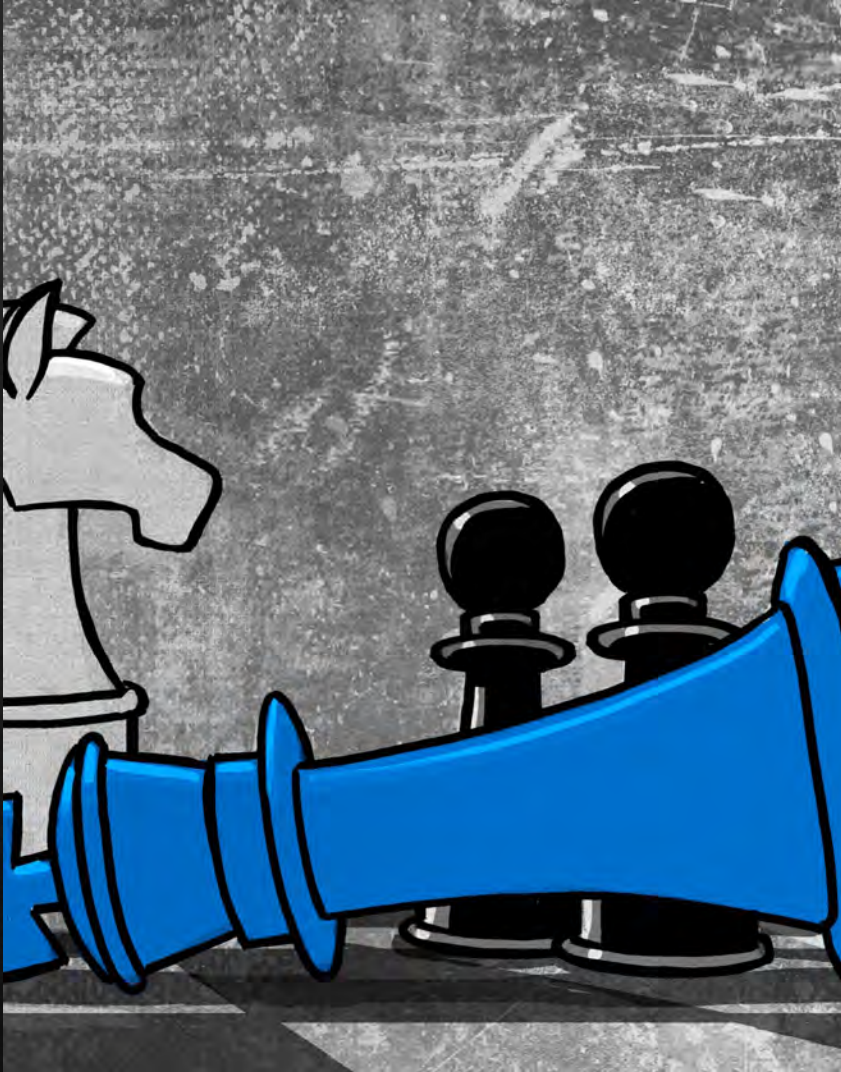




## Earned Time Credits: Losing Them

- ◇ Can lose ETC for violation of rules of EBRR program or PA but can **earn them back** “after clear conduct . . . for two consecutive risk and needs assessments.”
  - ◇ Warden given authority to restore time credits
  - ◇ Can appeal the loss of time credits

*28 C.F.R. § 523.43; 28 C.F.R. § 541; BOP Program Statement §5401.01*





# ETC Info in BOP Paperwork

- ❖ ETCs automatically uploaded to FSA Credit Assessment. Can be given to client.
- ❖ If Min/Low, BOP will estimate conditional projected release date (PRD) at first Unit Meeting—max number of ETCs that can be earned.
  - ❖ Can be found on Sentence Monitoring Computation Data Form

**FSA Time Credit Assessment**

[REDACTED]

**U.S. DEPARTMENT OF JUSTICE** **FEDERAL BUREAU OF PRISONS**

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Register Number.....: [REDACTED]	Responsible Facility: WIL
Inmate Name	Assessment Date.....: 03-25-2023
Last.....: [REDACTED]	Period Start/Stop...: 12-21-2018 to 03-25-2023
First.....: [REDACTED]	Accrued Pgm Days....: 1413
Middle.....: [REDACTED]	Disallowed Pgm Days.: 142
Suffix.....:	ETC Towards RRC/HC...: 310
Gender.....: MALE	ETC Towards Release.: 365
Start Incarceration: 05-04-2016	Apply ETC to Release: Yes

# TL; DR

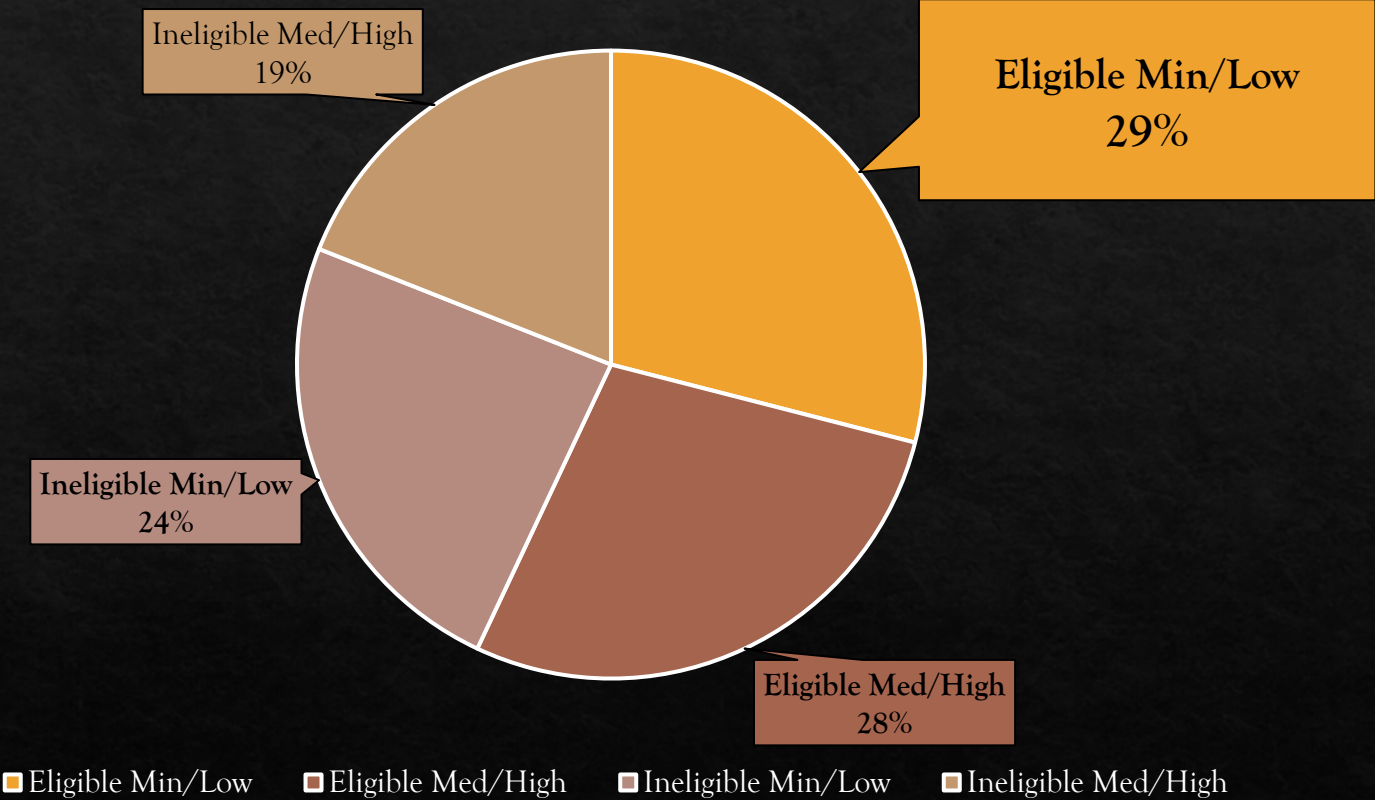
## Who Actually Gets To Use ETC?

- ◆ Individuals who are not disqualified.
- ◆ Min/Low can actually cash-in ETC
  - ◆ Eligible Med/Highs can earn credits but typically can't cash them in





# How many people can actually cash in their ETCs?



Section V  
Practical Application





How Can You Help?

18 U.S.C. § 3632(d)(4)

Time credits –

(A) In general – A prisoner, except for an ineligible prisoners under subparagraph (D), who successfully completes evidence-based recidivism reduction programming or productive activities shall earn time credits as follows:

.....


(C) Application of time credits toward prerelease custody or supervised release -- Time credits earned under this paragraph by prisoners who successfully participate in recidivism reduction programs or productive activities shall be applied toward time in prerelease custody or supervised release.



# Plea Agreements

## Charge Bargain

Plead to an eligible offense  
§ 3632(d)(4)(D)



## Negotiation

Negotiate away enhancements or facts

## Sentencing Variance

If ineligible, bargain for lesser sentence

18 U.S.C. § 3632(d)(4)(D)

Ineligible prisoners.--A prisoner is ineligible to receive time credits under this paragraph if the prisoner is serving a sentence for a conviction under any of the following provisions of law [list of exclusions]

# Presentence Investigation Report

1

Object to USSG role enhancements (Eligibility) - § 3632(d)(4)(D)(lxv), (lxvii)

2

Object to fentanyl (Eligibility) - § 3632(d)(4)(D)(lxvi), (lxviii)

3

Object to facts that show history of violence (PATTERN)

4

Object to facts that show history of escape (PATTERN)

5

Actively contribute to Part C (Needs Assessment)



# Detainers

- ◆ Identify all detainers
- ◆ Remove criminal detainers
- ◆ Counsel client regarding ICE



# Sentencing

Risk Recidivism Level	FTC Eligible	FTC Ineligible
High	21,844 (27.94%) X	15,215 (25.83%) X
Medium	15,849 (20.27%) X	10,859 (18.43%) X
Low	32,546 (41.62%)	25,217 (42.81%) X
Minimum	7,595 (9.71%)	7,444 (12.64%) X
Unassigned	358 (0.46%)	176 (0.3%) X
Total	78,192	58,911

Intent: Incentivize rehabilitation and decarcerate

Reality: People ineligible or not receiving

- 60+ crimes excluded statutorily
- PATTERN (discriminatory and unfair), so makes benefits illusory
- Pre-release custody is a unicorn

Request: Lesser sentence with community treatment

**Racial and Ethnic Neutrality.** Racial and ethnic neutrality were assessed through the comparison of AUC values and differential prediction analyses. While study findings continue to indicate that PATTERN is predictively accurate as a general matter, there remains evidence that the instrument overpredicts the risk of recidivism for some racial and ethnic groups relative to White individuals (e.g., Black, Hispanic, and Asian individuals on the male and female general tools). This disparity remains NIJ's leading concern related to PATTERN.

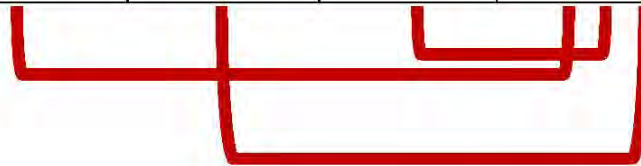


# ETC Eligibility Analysis

Earned Time Credit Statutory Eligibility						PATTERN Factors		Non-Citizen Clients	
Statute of Conviction	Categorically ineligible?	Heroin? (b)(1)(A),(B)	Meth? (b)(1)(A),(B)	Drug + "Involved" Fentanyl?	Role enhancement in PSR?	History of violence in PSR?	History of escape in PSR?	ICE Detainer?	Final Order of Removal?
1.	Yes No	Yes No	Yes No	Yes No	Yes No	Yes No	Yes No	Yes No	Yes No
2.	Yes No	Yes No	Yes No	Yes No	Yes No	Yes No	Yes No	Yes No	Yes No
3.	Yes No	Yes No	Yes No	Yes No	Yes No	Yes No	Yes No	Yes No	Yes No



Earned Time Credit Statutory Eligibility						PATTERN Factors		Non-Citizen Clients	
Statute of Conviction	Categorically ineligible?	Heroin? (b)(1)(A),(B)	Meth? (b)(1)(A),(B)	Drug + "Involved" Fentanyl?	Role enhancement in PSR?	History of violence in PSR?	History of escape in PSR?	ICE Detainer?	Final Order of Removal?
1.	Yes No	Yes No	Yes No	Yes No	Yes No	Yes No	Yes No	Yes No	Yes No
2.	Yes No	Yes No	Yes No	Yes No	Yes No	Yes No	Yes No	Yes No	Yes No
3.	Yes No	Yes No	Yes No	Yes No	Yes No	Yes No	Yes No	Yes No	Yes No



• Eligible for ETC if guilty of all Counts as charged and likely to appear in the PSR (circle one): Yes No

• If statutorily ineligible, what, if anything, can change that determination:

- Charge bargain \_\_\_\_\_
- Negotiated agreement for no role enhancement \_\_\_\_\_. If so, what enhancement \_\_\_\_\_
- Selective inclusion/exclusion of relevant conduct \_\_\_\_\_. If so, what conduct \_\_\_\_\_

• Projected PATTERN Score (age, conviction, prior history of violence, prior history of escapes): \_\_\_\_\_

• Risk of recidivism based on PATTERN (circle one): Minimum Low Medium High

• Advice to client regarding eligibility *and* ability to use ETCs for S/R and prelease custody: \_\_\_\_\_

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18 U.S.C. § 3632(d)(4)(D)

Ineligible prisoners.--A prisoner is ineligible to receive time credits under this paragraph if the prisoner is serving a sentence for a conviction under any of the following provisions of law [list of exclusions].

18 U.S.C. § 3584

(c) Treatment of multiple sentence[s] as an aggregate.--Multiple terms of imprisonment ordered to run consecutively or concurrently shall be treated for administrative purposes as a single, aggregate term of imprisonment.

18 U.S.C. § 3632(d)(4)(B)(ii)

Cannot earn credits "during official detention prior to the date the prisoner's sentence commences under [18 U.S.C. §] 3585(a)."

18 U.S.C. § 3585(a)

A sentence . . . commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served.

28 C.F.R. § 523.42(a)

An eligible inmate begins earning FSA Time Credits after the inmate's term of imprisonment commences (the date the inmate arrives or voluntarily surrenders at the designated Bureau facility where the sentence will be served).

18 U.S.C. § 3632(d)(4)(C)

Time credits earned under this paragraph by prisoners who successfully participate in recidivism reduction programs or productive activities shall be applied toward time in prerelease custody or supervised release.

28 C.F.R. § 523.41(c)(5)(iii)

Opting out will result in exclusion from further benefits or privileges allowable under the FSA, until the date the inmate "opts in" (chooses to participate in the EBRR programs or PAs that the Bureau has recommended . . . as documented by staff).

(1) Eligibility - § 3632(d)(4)(D)

- Misclassification
- Multiple Convictions - *Bonnie v. Dunbar*, 4:23-cv-01215 (D. South Carolina) - briefing

(2) Earning Status

- Transit Time - Compare § 3632(d)(4)(B)(ii) and § 3585(a) with 28 C.F.R. § 523.42(a)
- Opting Out or In - 28 C.F.R. § 523.41

(3) Miscalculations

(4) Cash Out for S/R + Pre-Release



# Some Common Problems



# When the BOP Gets it Wrong:

## ◇ (1) Paperwork (Client + FOIA)

- [BOP-OGC-EFOIA-S@bop.gov](mailto:BOP-OGC-EFOIA-S@bop.gov)

- Ask for the FSA Time Credit Assessment

FSA Time Credit Assessment

Register Number:

U.S. DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF PRISONS

Register Number.....  
 Inmate Name  
 Last.....  
 First.....  
 Middle.....  
 Suffix.....  
 Gender..... MALE  
 Start Incarceration: 06-12-2018

Responsible Facility: DTH  
 Assessment Date.....: 09-05-2023  
 Period Start/Stop...: 12-21-2018 to 09-05-2023  
 Accrued Pgm Days....: 1706  
 Disallowed Pgm Days.: 13  
 FTC Towards RRC/HC.: 235  
 FTC Towards Release.: 365  
 Apply FTC to Release: Yes

Start Stop Pgm Status Pgm Days  
 12-21-2018 02-25-2020 accrue 431  
 Accrued Pgm Days...: 431  
 Carry Over Pgm Days: 0  
 Time Credit Factor.: 10  
 Time Credits.....: 140

Start Stop Pgm Status Pgm Days  
 02-25-2020 03-09-2020 disallow 13  
 Not in qualifying admit status  
 Facility Category Assignment Start Stop  
 MAN ARS TRANSFER 02-24-2020 1044 02-24-2020 1044  
 B02 ARS A-ADMIT 02-24-2020 1044 02-24-2020 1747  
 B02 ARS RELEASE 02-24-2020 1747 02-24-2020 1747  
 ATL ARS A-BOP HLD 02-24-2020 1747 02-28-2020 1145  
 ATL ARS HLD REMOVE 02-28-2020 1145 02-28-2020 1145  
 A01 ARS A-ADMIT 02-28-2020 1145 02-28-2020 1840  
 OKL ARS A-BOP HLD 02-28-2020 1740 03-09-2020 0849  
 A01 ARS RELEASE 02-28-2020 1840 02-28-2020 1840

Start Stop Pgm Status Pgm Days  
 03-09-2020 12-28-2022 accrue 1024  
 Accrued Pgm Days...: 1024  
 Carry Over Pgm Days: 11  
 Time Credit Factor.: 10  
 Time Credits.....: 340

Start Stop Pgm Status Pgm Days  
 12-28-2022 09-05-2023 accrue 251  
 Accrued Pgm Days...: 251  
 Carry Over Pgm Days: 15  
 Time Credit Factor.: 15

FSA Time Credit Assessment

Register Number:

U.S. DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF PRISONS

Time Credits.....: 120

--- FSA Assessment ---

#	Start	Stop	Status	Risk Assignment	Risk Asn Start	Factor
001	12-21-2018	01-18-2019	ACTUAL	FSA R-MED	04-28-2021 1203	10
002	01-18-2019	07-17-2019	ACTUAL	FSA R-MED	04-28-2021 1203	10
003	07-17-2019	01-13-2020	ACTUAL	FSA R-MED	04-28-2021 1203	10
004	01-13-2020	07-11-2020	ACTUAL	FSA R-MED	04-28-2021 1203	10
005	07-11-2020	01-07-2021	ACTUAL	FSA R-MED	04-28-2021 1203	10
006	01-07-2021	07-06-2021	ACTUAL	FSA R-MED	04-28-2021 1203	10
007	07-06-2021	01-02-2022	ACTUAL	FSA R-MED	04-28-2021 1203	10
008	01-02-2022	07-01-2022	ACTUAL	FSA R-LW	12-28-2021 1412	10
009	07-01-2022	12-28-2022	ACTUAL	FSA R-LW	06-24-2022 1218	10
010	12-28-2022	06-26-2023	ACTUAL	FSA R-LW	12-20-2022 1120	15
011	06-26-2023	12-23-2023	ACTUAL	FSA R-LW	12-20-2022 1120	15



- ◇ (2) Contact Regional Counsel
  
- ◇ (3) Administrative Remedy Program
  - ◇ BOP Program Statement 1330.18
  - ◇ Wash Lawyers' Committee Guide

## **7. INFORMAL RESOLUTION §542.13**

**a. Informal Resolution.** Except as provided in §542.13(b), an inmate shall first present an issue of concern informally to staff, and staff shall attempt to informally resolve the issue before an inmate submits a Request for Administrative Remedy. Each warden shall establish procedures to allow for the informal resolution of inmate complaints.

## **8. INITIAL FILING §542.14**

**a. Submission.** The deadline for completion of informal resolution and submission of a formal written Administrative Remedy Request, on the appropriate form (BP-9), is 20 calendar days following the date on which the basis for the Request occurred.



## 9. APPEALS § 542.15

a. **Submission.** An inmate who is not satisfied with the Warden's response may submit an Appeal on the appropriate form (BP-10) to the appropriate Regional Director within 20 calendar days of the date the Warden signed the response. An inmate who is not satisfied with the Regional Director's response may submit an Appeal on the appropriate form (BP-11) to the General Counsel within 30 calendar days of the date the Regional Director signed the response. When the inmate

## 10. ASSISTANCE §542.16

a. An inmate may obtain assistance from another inmate or from institution staff in preparing a Request or an Appeal. An inmate may also obtain assistance from outside sources, such as family members or attorneys. However, no person may submit a Request or Appeal on the inmate's behalf, and obtaining assistance will not be considered a valid reason for exceeding a time limit for submission unless the delay was caused by staff.

## ◇ (4) File a 2241 Petition in District of Confinement

28 U.S.C. § 2241(c)

The writ of habeas corpus shall not extend to a prisoner unless – (3) He is in custody in violation of the Constitution or laws or treaties of the United States.

Claim is the BOP is acting contrary to law, has violated the Constitution, or has exceeded statutory authority. This is not a way to challenge discretionary determinations.



## Some Example § 2241 Bases

- ◆ Erroneous evaluation of statutory eligibility.
- ◆ Non-eligible offense taints eligible offense.
- ◆ No credit accrual while in transit.
- ◆ Refusal to transfer to S/R -- not pre-release custody?
- ◆ Other BOP practices that are inconsistent with statute.

## ◇ (5) Reduction in Sentence - U.S.S.G. §1B1.13(b)(5)

(b) *Extraordinary and Compelling Reasons.*—Extraordinary and compelling reasons exist under any of the following circumstances or a combination thereof:

(5) *Other Reasons.*—The defendant presents any other circumstance or combination of circumstances that, when considered by themselves or together with any of the reasons described in paragraphs (1) through (4), are similar in gravity to those described in paragraphs (1) through (4).



## ◇ (6) Unused Credits Reduce Supervised Release?

18 U.S.C. § 3632(d)(4)(C)

Time credits earned under this paragraph by prisoners who successfully participate in recidivism reduction programs or productive activities shall be applied toward time in prerelease custody or supervised release.



28 U.S.C. § 2243

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

## ◇ (7) Early Termination of Supervised Release

This is not to say that White is without a remedy. The Bureau of Prisons acknowledges it mis-classified her as ineligible for the FSA while she was incarcerated. Had the Bureau of Prisons properly classified her initially in 2019 or upon receiving her administrative appeals, it could have moved her toward a period of supervised release, but by no more than 12 months, or one-year. The *Harrison* court observed that the sentencing court could consider the inequity of the prisoner having served too much time in prison along with other relevant factors in modifying or terminating the Harrison's term of supervised release. *Harrison*, No. 22-14312, 2022 WL 17093441 at \*2 (S.D. Fla., Nov. 21, 2022).

If White is entitled to relief, she should file a motion under 18 U.S.C. § 3583(e) to terminate her term of supervised release; of course, she must complete a minimum of one-year of her term



# Helpful Resources

- ◇ First Step Act [Statute](#)
- ◇ ETC Regulation
  - ◇ Earned Time Credit [Final Rule](#), 28 C.F.R §523-541
- ◇ ETC Policy
  - ◇ BOP ETC [Program Stmt](#) §5410.01, Nov. 18, 2022; updated in 2023)
  - ◇ BOP [Talking Points](#) on ETC
- ◇ Federal Defender [One-Pager](#) on ETC
- ◇ Brennan Center [Article](#) on PATTERN and ETCs
- ◇ FAMM [Explainer](#) on ETC Rule (Nov. 2022)
- ◇ BOP PATTERN [Tools and Cut Points](#)
- ◇ BOP FSA Programs [Guide](#) (Sept. 2023)
- ◇ First Step Act Annual [Report](#) (April 2023)

# Questions?

For any questions/share information,  
reach out at:

[eblackwood@nacdl.org](mailto:eblackwood@nacdl.org)

[alison-guernsey@uiowa.edu](mailto:alison-guernsey@uiowa.edu)

