Published By Joaquin & Duncan, L.L.C.;
A Law Firm of Federal Sentencing Attorneys

January 2020

Sentencing Partners

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Sentencing Partners is published monthly and attempts to report the most recent cases that can aid you in effectively representing your clients at sentencing and in keeping you advised of the developments in the United States Sentencing Guidelines. If there is an issue of particular interest that you would like discussed in Sentencing Partners, please feel free to contact us.

About Joaquin & Duncan, LLC:

Joaquin and Duncan, L.L.C. is a law firm of federal sentencing attorneys who work on a contract basis with criminal defense attorneys assisting in pre-plea advisement; review of pre-sentence reports; preparation of objections and motions for downward departure; preparation of motions for bond; preparation of appellate briefs; preparation of 2255 petitions; and assistance in obtaining choice of prison or drug treatment program.

Department of Justice Announces Updates on First Step Act Implementation

The FSA provides for eligible inmates to earn time credits if they participate and complete assigned evidence-based recidivism reduction programs or productive activities. It also provides for the expansion of existing programs that allow for compassionate release and home confinement. Below is an update on the implementation of some of the FSA provisions:

- Releases for Good Conduct Time. In July 2019, over 3,100 federal prison inmates were released from BOP custody as a result of the increase in good conduct time under the Act.
- Retroactive Resentencing. The Act's retroactive application of the Fair Sentencing Act of 2010 (reducing the disparity between crack cocaine and powder cocaine threshold amounts triggering mandatory minimum sentences) has resulted in 2,471 orders for sentence reductions.
- Compassionate Release. The BOP updated its policies to reflect the new procedures for inmates to obtain "compassionate release" sentence reductions under 18 U.S.C. Section 3582 and 4205(g). Since the Act was signed into law, 124 requests have been approved, as compared to 34 total in 2018.
- Expanded Use of Home Confinement. The FSA authorizes the BOP to maximize the use of home confinement for low risk offenders. Currently, there are approximately 2,000 inmates on Home Confinement. The legislation also expands a pilot program for eligible elderly and terminally ill offenders to be transitioned to Home Confinement as part of a pilot program. Since enactment of the law, 379 inmates have been approved for participation under the pilot program.
- Drug Treatment. In Fiscal Year 2019, approximately 14,800 offenders enrolled in Residential Drug Abuse Program (RDAP), almost 21,000 offenders enrolled in Non-residential drug treatment, and almost 23,000 offenders participated in Drug Education.
- Medication Assisted Treatment (MAT). The FSA requires BOP to assess the availability of and the capacity to treat heroin and opioid abuse through evidence-based programs, including medication-assisted treatment. In the wake of the opioid crisis, this initiative is important to improve reentry outcomes. Every inmate within 15 months of release who might qualify for MAT has been screened.
- Effective Re-Entry Programming. FSA implementation includes helping offenders successfully reintegrate into the community – a critical factor in preventing recidivism and, in turn, reducing the number of crime victims. Finding gainful employment is an important part of that process. In furtherance of this goal, the BOP launched a "Ready to Work" initiative to connect private employers with inmates nearing release under the FSA.

Case Summaries

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General Information (Chapter 1)

United States v. Mantha
944 F.3d 352 (1st Cir. 2019)
Applying one-book and multiple-offense rules to ungrouped offenses constituted ex post facto violation

In 2001, the defendant molested a child who was then between six and eight years old and recorded the molestation on a VHS tape. Fifteen years later, the defendant's employer caught him searching for and viewing child pornography on his workplace computer. A subsequent search of his home turned up the 2001 recording, as well as electronic storage devices containing additional child pornography. The defendant entered a straight guilty plea to three offenses: (1) sexual exploitation of a child (based on the 2001 incident); (2) access with intent to view child pornography; and (3) possession of child pornography. The last two offenses were based on the later charges. The PSR grouped the later charges, but not the 2001 charge because it was insufficiently related to the more recent two offenses. The PSR employed the 2016 version of the guidelines to calculate the offense levels for both the two grouped offenses and for the ungrouped 2001 offense. Under the 2016 guideline manual, the 2001 offense generated an adjusted offense level (AOL) of 40. The grouping resulted in a sentencing range of 210 to 240 months. Under the manual in effect at the time of the 2001 offense, the adjusted offense level, after grouping, would have resulted in a range of 121 to 151 months. The defendant and the government both objected, arguing that using the 2016 manual was a violation of the Ex Post Facto clause. Regardless, the district court adopted the PSR and imposed a sentence of 196 months.

On appeal, the First Circuit noted that §1B1.11(b)(2) sets out the "one-book rule:" "The Guidelines Manual in effect on a particular date shall be applied in its entirety." Further, §1B1.11(b)(3) sets out the "multiple-offense rule": "If the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual is to be applied to both offenses." "Viewed in the aggregate, these rules call for the approach taken by the district court, subject to one caveat: The Guidelines also warn that (of course) the manual in effect at the time of sentencing should not be used if doing so would violate the ex post facto clause." §1B1.11(b)(1). Applying a version of the guidelines adopted after an offense was committed will violate the Ex Post Facto Clause where the newer guidelines resulted in a higher sentencing range than the version in effect at the time the offense was committed. "Our holding today is a narrow one. We hold only that, under the present circumstances, where the [Total Offense Level] is raised by application of a Guidelines amendment to a pre-amendment offense based solely on the existence of post-amendment offenses that are not closely related to the

earlier offense, use of the post-amendment Guidelines is unconstitutional."

Circuit Split

Three of the four circuits that have addressed the question have held that application of the one-book and multiple-offense rules to ungrouped offenses constitutes an ex post facto violation. *See United States v. McMillian*, 777 F.3d 444 (7th Cir. 2015); *United States v. Saferstein*, 673 F.3d 237 (3d Cir. 2012); *United States v. Lacefield*, 146 F. App'x 15, 22 (6th Cir. 2005). The only circuit court opinion to the contrary relied almost exclusively on the Guidelines commentary in reaching that result. *See United States v. Butler*, 429 F.3d 140, (5th Cir. 2005).

Offense Conduct (Chapter 2)

United States v. Wang
2019 WL 6835332 (9th Cir. 2019)
Cross-reference to §2L2.1 (visa fraud guideline) should have been used instead of §2B1.1

Between July 2005 and October 2009, the defendant defrauded the United States into issuing H-2B nonimmigrant visas for 173 foreign construction workers in Guam. As part of his scheme, he knowingly mailed I-129 petitions to the United States Citizenship and Immigration Services (USCIS) containing false statements made under oath. He pled guilty to one count each of mail fraud, visa fraud, money laundering, and willful failure to pay over tax. While he awaited sentencing, he was indicted for conspiracy to commit visa fraud and visa fraud, based on his attempt to secure an L-1 nonimmigrant visa between December 2012 and May 2014. He provided false employment information in an I-129 petition. He pled guilty to one count of conspiracy to commit visa fraud. The cases were combined for sentencing. The PSR grouped the first case's offenses into Group 1 and the second case's offense into Group 2, and used §2B1.1 to calculate a sentencing range of 87 to 108 months. After departing for substantial assistance, the defendant was sentenced to 57 months, the high end of the range.

On appeal, the defendant argued that the court should have used §2L2.1 instead of §2B1.1, based on the cross-reference in §2B1.1(c)(3) and its commentary, in light of *United States v. Velez*, 113 F.3d 1035 (9th Cir. 1997). Reviewing for plain error, the Ninth Circuit agreed, explaining that the cross-references in §2B1.1(c)(1)-(4) instruct a court use another guideline when certain requirements are satisfied. Here, the cross-reference in §2B1.1(c)(3) applied because the defendant met the three requirements set out therein. Not applying the cross-reference was plain error because "it was contrary to law." The error also affected the defendant's substantial rights because applying the correct guideline would have resulted in a lower offense level (22 versus 29). Finally, the error "seriously affected the fairness, integrity, or public reputation of judicial proceedings" because the district court imposed a sentence at the high end of the sentencing range when the properly calculated range should have been 24 to 30 months. The sentence was vacated and remanded.

United States v. Brewington
2019 WL 6870591 (10th Cir. 2019)
Ex Post Facto violation when 2015 amendment applied

The defendant was found guilty of various fraud and money laundering transactions

resulting from a fraudulent investment scheme. The offense concluded in 2011, such that the 2010 guidelines applied. In 2010, §2B1.1(b)(2)(A)(i) allowed a two-level enhancement if the offense involved at least ten victims. That guideline was amended in 2015 and allowed the enhancement to apply if there were less than ten victims, but any of the victims experienced "substantial financial hardship." The sentencing court found two victims suffered substantial hardship, applied the enhancement under the 2015 amendment, and imposed a sentence of 70 months.

On appeal, the defendant argued that applying the 2015 amendment constituted a violation of the Ex Post Facto Clause. The government conceded that the district court erred. The Tenth Circuit agreed, explaining that two victims suffering financial hardship would not allow application of the enhancement under the 2010 guideline, as that guideline did not allow application of the enhancement if there were fewer than ten victims. The sentence was reversed and the case remanded for re-sentencing with instruction for the sentencing court to determine whether the enhancement, as written in 2010, applied to the defendant's conduct.

Sentence Adjustments (Chapter 3)

United States v. Harmon
944 F.3d 734 (8th Cir. 2019)
Record insufficient to review enhancement for obstruction of justice

From 2010 to 2016, the defendant worked in the Illinois State Motor Vehicle Registration Office, where he issued vehicle registrations. An audit revealed that he had been involved in at least 200 transactions where vehicles were purchased in Missouri but registered in Illinois, and the sales prices reported in Illinois were lower than the actual purchase price. By doing so, Missouri was unable to collect annual taxes due on the on vehicles, resulting in a loss of revenue by the state. A jury found him guilty of one count of Conspiracy to Commit an Offense Against the United States, and three counts of Mail Fraud. The PSR recommended a total offense level of 23, which included a two-point enhancement for obstruction of justice, based on the defendant's alleged perjury at trial and improper interaction with a possible witness by asking the witness to write a letter on his behalf. The district court summarily overruled the defendant's objection, adopted the PSR, and ultimately varied downward to a sentence of 33 months.

On appeal, the Eighth Circuit found that the district court's statement regarding the obstruction enhancement "did not make any specific factual findings or clarify the basis – perjury or witness interference – for the enhancement. Therefore, without coming to a conclusion as to whether the enhancement could be appropriately applied in this case, we conclude the record does not establish with the required clarity that the district court exercised its independent judgment in reaching its decision to impose the enhancement." Here, the district court's findings "provided insufficient support" for the enhancement. The sentence was vacated and remanded.

United States v. Bankston
2019 WL 7042409 (11th Cir. 2019)
Enhancement for "use" of body armor under §3B1.5 reversed

The defendant sold body armor vests to an undercover detective, along with stolen guns,

ammunition and methamphetamine. The vests had been previously stolen from a law enforcement officer's vehicle. He pled guilty to two counts of unlawful possession and one count of methamphetamine distribution. The district court applied a two-level enhancement for the "use" of body armor in a drug trafficking offense pursuant to §3B1.5 and imposed a sentence of 130 months. The enhancement was based on the PSR's assertion that the sale of the body armor amounted to "use" as a means of bartering, such that the conduct fit within the guideline commentary.

On appeal, the defendant argued that there was no evidence he used body armor as defined in the guideline. Reviewing for plain error, the Eleventh Circuit, finding that selling body armor did not equate to bartering. "Use" is defined in the commentary as "active employment in a manner to protect the person from gunfire," or "use as a means of bartering." §3B1.5, cmt. n. 1. The court found that "selling" was an activity that under both common usage and dictionary definition fell outside of bartering. In fact, "barter" means to trade goods or services *without using money*." Noting that the guidelines "must be read together" with commentary, the court found that the enhancement was inapplicable under the facts in this case. *See United States v. Ferreira*, 275 F.3d 1020, 1029 (11th Cir. 2001). The court rejected the government's argument that legislative history reflected the purpose of the guideline was to remove body armor from the hands of violent criminals and drug traffickers. The court noted that legislative history should not be used when "the import of the words Congress has used is clear." The court also pointed to the Fifth Circuit decision holding that under the plain language of the body-armor enhancement, it does not apply to the sale of body armor. *See United States v. Juarez,* 866 F.3d 622, 633 (5th Cir. 2017). While the defendant's sentence of 130 months would fall within the new guideline range that would result without the enhancement, the court found that he had shown a reasonably probability the outcome would be different under the correct range as required under the plain error standard of review. "When a defendant is sentenced under an incorrect Guidelines range - whether or not the defendant's ultimate sentence falls within the correct range - the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." *Molina-Martinez v. United States,* – U.S. –, 136 S.Ct. 1338 (2016). The court found the other prongs of the plain error standard had been met, vacated the sentence, and remanded for re-sentencing.

First Step Act

United States v. McDonald
944 F.3d 769 (8th Cir. 2019)
Defendant met requirements for sentence reduction under First Step Act

In 1999, the defendant was found guilty of four counts of a superseding indictment, including one count for distributing two ounces of cocaine base. He was sentenced to life imprisonment. In 2015, the defendant moved for a sentence reduction based on Amendment 782, which decreased his base offense level from 38 to 36, resulting in a sentencing range of 360 months to life. The district court granted the motion and reduced his sentence to 360 months. In January 2019, the defendant filed a pro se motion for a reduced sentence under the First Step Act, which made retroactive the lower penalties for cocaine base offenses established by the Fair Sentencing Act. The district court denied the motion without a hearing, finding the defendant ineligible for

relief because his sentence was based on 150 kilograms of powder cocaine rather than cocaine base.

On appeal, the defendant argued that he was eligible for a reduced sentence under the First Step Act because his conviction was for distributing cocaine base, not powder cocaine. The government responded that the district court's decision was proper because he had already received a reduced sentence in 2016, and that sentence was within the statutory limits set by the Fair Sentencing Act. The Eighth Circuit reversed, initially finding that while the sentence was based on more than 150 kilograms of powder cocaine, that guidelines calculation did not change the fact that he was convicted on one count for distributing cocaine base. "The First Step Act applies to offenses, not conduct, . . . and it is "the defendant's] statute of conviction that determines his eligibility for relief." Next, the court's "consideration of a motion for a reduced sentence under §404 of the First Step Act proceeds in two steps. "First, the court must decide whether the defendant is eligible for relief under §404. Second, if the defendant is eligible, the court must decide, in its discretion, whether to grant a reduction. That the court might properly deny relief at the discretionary second step does not remedy any error in determining ineligibility at the first step." Here, the defendant was eligible for relief. The fact that his sentence had previously reduced based on a retroactive guidelines amendment "does not affect his eligibility for a sentence reduction under the First Step Act." The matter was remanded. In response to the defendant's contention that a hearing must be conducted, the court noted that "we have already decided that the First Step Act does not require district courts to hold a hearing when considering §404 motions."

United States v. Jackson
945 F.3d 315 (5th Cir. 2019)
Defendant eligible for resentencing under First Step Act, but district court not required to hold hearing or consider post-sentencing conduct prior to denying motion

In 2003, the defendant was sentenced to life following a jury finding him guilty of two drug-related counts: possession with intent to distribute fifty grams or more of crack, and conspiracy to do the same. Seven years after sentencing, Congress enacted the Fair Sentencing Act of 2010, but it was not retroactively applied to the defendant. However, the passage of the First Step Act (FSA, § 404(b)), gave sentencing courts discretion to "impose a reduced sentence as if section[ ] 2 . . . of the Fair Sentencing Act . . . were in effect at the time the covered offense was committed." The defendant moved for resentencing under the FSA. The district court denied the motion but failed to say why. On limited remand, it explained that it had assumed, without deciding, that the defendant had a "covered offense" under section 404(a), but denied relief because (1) his life sentence still fell within the permissible statutory range; (2) he had played a central role in the underlying offense; and (3) his numerous previous convictions had earned him the highest criminal history.

On appeal, the defendant argued he had a "covered offense" and that the district court erred in not holding a full hearing at resentencing. The Fifth Circuit explained that the first inquiry in evaluating a motion under section 404 was whether the defendant has a "covered offense." The FSA defines such an offense as "a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 . . . that was committed

before August 3, 2010." The court concluded: " whether a defendant has a 'covered offense' under section 404(a) depends only on the statute under which he was convicted. If he was convicted of violating a *statute* whose penalties were modified by the Fair Sentencing Act, then he meets that aspect of a covered offense" and was thus eligible for resentencing. However, simply because he was eligible did not mean he was entitled. Here, the district court exercised its broad discretion and decided not to resentence. "It noted that [the defendant's] life sentence still would have fallen within the appropriate statutory range were the Fair Sentencing Act applied, and it relied on his extensive criminal history and central role in the offense." Contrary to the defendant's position, the district court was not required to conduct a hearing with a "complete review" of his motion "on the merits." Nor was the district court required to consider the defendant's post-conviction conduct. "The FSA doesn't contemplate a plenary resentencing. Instead, the court 'plac[es] itself *in the time frame of the original sentencing*, altering the relevant legal landscape *only by* the changes mandated by the 2010 Fair Sentencing Act.'" (emphasis in original). The judgment was affirmed.

Miscellaneous Issues

United States v. Pugh
2019 WL 6708812 (2nd Cir. 2019)
Court did not give adequate reasoning for imposing maximum sentence

The defendant, a United States citizen and Air Force Veteran, moved to the Middle East to work as a civilian contractor for different aerospace companies after he left the military. While living overseas, he began researching the Islamic State ("ISIS") and downloading propaganda materials, as well as discussing ISIS tactics and activities online via Facebook. After being denied entry into Turkey, he was returned to Egypt where law enforcement officers discovered several electronic media devices in his luggage. A search of his laptop revealed internet searches, videos, and pictures relating to ISIS, as well as a letter purportedly drafted by the defendant to his wife in which he pledges his allegiance to ISIS. A jury convicted him of attempting to provide material support to a foreign terrorist organization, and obstruction and attempted obstruction of an official proceeding. The district court sentenced him to 180 months on the first count and 240 months on the second, the maximum sentence under each statute, to run consecutively, for a total effective sentence of 420 months.

On appeal, the defendant contended that his sentence was substantively unreasonable because the district court did not give adequate reasoning for imposing the maximum permissible sentence. The Second Circuit stated that the district judge was obligated, at the time of sentencing, to "state in open court the reasons for its imposition of the particular sentence." The district judge had a further obligation to "state in open court . . . the reason for imposing a sentence at a particular point within the [Guidelines] range . . . . Those statutory requirements were not met in this case." In this case, most of the district court's comments related to the defendant's guilt rather than to an appropriate sentence. "Those comments do not provide a basis for understanding why the particular sentence was imposed, much less for understanding why a sentence at the top of the Sentencing Guideline range, which was also the statutory maximum, was imposed." "The present record does not permit meaningful appellate review of [the defendant's] argument that his sentence is substantively unreasonable. Without more, we

cannot be confident that the district court appropriately exercised its discretion in crafting the sentence." Accordingly, the sentence was vacated and remanded for the district court to state in open court the reasons for whatever sentence it imposes.

United States v. Mitchell
944 F.3d 116 (3rd Cir. 2019)
Relying on defendant's bare arrest record in determining sentence was error

A confidential informant ("CI") made three controlled purchases of PCP from the defendant. While searching several properties owned or controlled by the defendant, agents found drugs (PCP, crack cocaine, marijuana), cash, and firearms. The defendant was found guilty on 17 counts of drug and firearm charges. The PSR calculated a criminal history category of VI, which included seven juvenile adjudications and six prior adult convictions, including two convictions for robbery and one federal conviction for conspiracy to distribute cocaine. The PSR also listed the defendant's 18 arrests that did not lead to conviction, but did not contain any information about the underlying facts or circumstances of 17 of those 18 arrests. In calculating the sentence, the district court relied in part on the defendant's record of arrests that did not lead to conviction, describing his juvenile adjudications and adult convictions, and enumerating each of the 18 arrests without mentioning the details of disposition. The judge commented that the defendant's criminal record was the longest and most serious it had seen in 12 years. The court ultimately imposed a sentence of 1,020 months (85 years).

On appeal, the defendant argued that the district court plainly erred by relying on his bare arrest record at sentencing. The Third Circuit explained that the Due Process Clause prohibited a defendant from being deprived of liberty based upon mere speculation. "Accordingly, in determining a sentence, although a court can mention a defendant's record of prior arrests that did not lead to conviction, it cannot rely on such a record." "A bare arrest record – without more – does not justify an assumption that a defendant has committed other crimes." In the district court's Statement of Reasons, "extensive criminal history" was the only justification given for the sentence, which amounted to a failure distinguish between adjudications, adult convictions, and adult arrests. "Looking at the record below in its entirety, we conclude that the District Court improperly relied on [the defendants] bare arrest record in determining his sentence." The sentence was vacated and remanded.

Cases In This Issue

United States v. Bankston, 2019 WL 7042409 (11th Cir. 2019)
United States v. Brewington, 2019 WL 6870591 (10th Cir. 2019)
United States v. Harmon, 944 F.3d 734 (8th Cir. 2019)
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United States v. Wang, 2019 WL 6835332 (9th Cir. 2019)

My Federal Prison Consultant, L.L.C. | January 2020

BOP Insider

A Case Manager's (Ret'd) Perspective

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These articles will provide general information about various BOP-related topics from the perspective of someone who worked inside the BOP for over 23 years. It is our goal to aid you in effectively representing your clients before and after sentencing and in keeping you advised of the developments in connection with the BOP.

About My Federal Prison Consultant LLC

Donson is a qualified expert in the following BOP-related fields:

- Reviewing PSR for "red flag" confinement-related issues;
- Security designation and classification;
- BOP correctional programs;
- Restrictive housing (solitary confinement);
- Supervised release issues;
- Evaluating BOP records for re-sentencing.

He is available for consultation and testimony.

FSA Crunch time for FTC

I was hoping the draft policy entitled First Step Act of 2018 –Time Credits: Procedures for Implementation of 18 USC §3632(d)(4), which was circulating at the time of my last article, would have been released by now but it has not. However, late last week the BOP posted a six page booklet listing the evidenced based recidivism reduction programs (EBRR) and productive activities (PA) which qualify for the FSA extra time credit (aka: FTC). The list includes 70 programs reportedly conducted at most facilities which range from a three hour program entitled "Health and Wellness throughout the Lifespan" to 500 hour residential programs such as BRAVE, Challenge and RDAP. A UNICOR work assignment is also credited with 500 hours as is the completion of an Occupational Educational (VT) Program. One of the most important BOP educational and training policies discussing such programs is entitled Occupational Educational Programs # 5353.01, which can be found in the law library or on the internet.[1]

To earn FTC, one must not only complete the identified programs, but not have excludable offenses for the instant offense or prior criminal history. By now, everyone reading this article who is incarcerated should have a form on file called a BP-A1131, Determination of First Step Act (FSA) Eligibility. This form indicates if one is eligible for the FTC, and if so, one must also consider the assigned risk level from the PATTERN tool to determine the rate of the award. When the BOP provided FSA training, they used the analogy of the 500 hr. RDAP Program to determine the FTC rate for people who meet all eligibility criteria. (i.e. 500 hr. program, 8 hrs = 1 day: 500/8 = 62.5 days of programming = 60 days as the 2.5 days are carried forward to the next program award). That formula calculates 20 days FTC for high and medium risk and 30 days for minimum and low risk. Only programs completed after January 15, 2020 will count towards the extra credit. Unlike "old law" extra good time, the FTC is not deducted from the projected release date, but is calculated to determine transfer eligibility to "pre-release custody or supervised release."

Keep in mind the PATTERN assessment criteria have recently changed and will continue to be revised periodically. The following statement was released by the BOP on January 17, at the time of the programs list: "As a result of the changes to PATTERN that have been approved and announced by the Attorney General, the BOP will review current risk scores and levels to determine where adjustments may need to be made to some inmates' risk scores and risk levels. As a result of these reviews, some inmates may see a change (e.g. a Low risk inmate may now be a Medium risk offender which may make him or her eligible for higher priority to participate in evidence-based recidivism reduction programs or a Medium risk inmate may now be a Low risk, making him or her eligible for additional time credits.)" That being said, it would be beneficial to try and determine if any of the changes impacted one's risk level. It is extremely important to always review the inmate program review reports generated at team meetings because risk assignments are tracked in the SENTRY computer data base and included on these forms.

RRC capacity will also be an interesting issue as implementation progresses because I am already hearing about limited bed space availability around the country and that is without any FTC award implementation.

[1] Program Statement 5353.01, available at: https://www.bop.gov/policy/progstat/5353_001.pdf