

## **FREQUENTLY ASKED QUESTIONS ABOUT THE RESIDENTIAL DRUG ABUSE PROGRAM (RDAP)**

### **Q1: What is the Residential Drug Abuse Program (RDAP)?**

**A:** The RDAP is a voluntary, 500-hour, nine- to twelve-month program of individual and group therapy for federal prisoners with substance abuse problems. It is authorized by 18 U.S.C. § 3621, which directs the Bureau of Prisons (BOP) to provide “residential substance abuse treatment (and make arrangements for appropriate aftercare) . . . for all eligible prisoners.” As an incentive to get prisoners to participate, federal law allows the BOP to reduce the sentences of RDAP graduates convicted of “nonviolent” offenses by up to one year.

### **Q2: Does the RDAP benefit state prisoners?**

**A:** No. The RDAP only exists in federal prisons. State prisoners cannot participate in it.

### **Q3: Where can someone find the BOP’s policy statements on the RDAP?**

**A:** On March 16, 2009, new rules issued by the BOP went into effect. These new rules created some significant changes to older versions of the BOP’s RDAP regulations. The 2009 rules and program statements are available online or in prison law libraries:

- BOP Program Statement # 5331.02 (Mar. 16, 2009), *available at* <http://www.bop.gov/DataSource/execute/dsPolicyLoc>.
- Chapter 2 of BOP Program Statement # 5330.11 (Mar. 16, 2009), *available at* <http://www.bop.gov/DataSource/execute/dsPolicyLoc>.
- 74 Fed. Reg. 1892-99 (effective Mar. 16, 2009, codified at C.F.R. § 550.50-550.57).
- BOP Program Statement # 5162.05 (Mar. 16, 2009), *available at* <http://www.bop.gov/DataSource/execute/dsPolicyLoc>.

### **Q4: What does the RDAP consist of?**

**A:** The RDAP is divided into three parts:

- 1) The unit-based component. This is a six- to twelve-month, 500-hour residential program. Participants typically live in a special section of the prison and split the day between drug abuse treatment program activities and prison work or educational programs. At the end of this phase, inmates receive a “certificate of completion.”
- 2) Follow-up services. Unless the prisoner is scheduled to go directly to a halfway house after finishing the unit-based component, they will be reintroduced to the general population and will participate in the follow-up services offered in the prison. This is the first part of the after-care requirement.
- 3) Transitional drug abuse treatment (TDAT). This lasts up to six months and occurs in a halfway house (or, sometimes, on home confinement, depending on where the BOP assigns the prisoner). This is the second and final part of the RDAP’s after-care requirement.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

***The Pre-2009 Rules***

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

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

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

***Paulsen***

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

***Arrington***

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

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

***The 2009 Rules***

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

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

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

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

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

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

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

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

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

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

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

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

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

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

***Crickon***

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

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

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

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

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

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

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

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

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

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

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

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

A: This is a multi-step process:

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

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

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

If the prisoner **is** eligible,

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

If the prisoner **is not** eligible,

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



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

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

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

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

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

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

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

**LEGAL DISCLAIMER:**

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

5/3/12

---

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

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