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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, **Plaintiff,** **v.** **MARK JOHN WALKER,** **Defendant.**	**Case No. 3:10-cr-00298-RRB-1** **MOTION FOR HABEAS CORPUS RELIEF AND FOR INTERIM CONDITIONAL RELEASE PENDING DETERMINATION REGARDING THE APPLICABILITY OF THE FIRST STEP ACT AMENDMENT TO THE GOOD TIME CREDIT STATUTE**

Introduction

On July 18, 2011, this Court sentenced Mark John Walker to a ten-year term of imprisonment for one count of deprivation of rights under color of law, in violation of 18 U.S.C. § 242. Under federal statutes, a term of imprisonment is satisfied through actual time in custody plus good time credits. 18 U.S.C. § 3624(a) and (b). For years, the Bureau of Prisons (BOP) has interpreted the good time credit statute to permit a maximum credit of only 47 days per year of the sentence imposed, despite the statutory reference to 54 days of credit. In the First Step Act of 2018

(Title I of which is attached as Appendix A), Congress amended § 3624(b) to finally permit full credit of 54 days per year of the sentence imposed. App. A at 43-44. This amendment applies retroactively. App. A at 53.

Mr. Walker has been an exemplary prisoner and earned all available good time credits. Therefore, he should receive an additional 70 days of good time credits on his ten-year sentence under the amended statute, advancing his current projected release date from April 8, 2019, to January 28, 2019. However, the BOP has not yet acted to change Mr. Walker's projected release date, asserting that the First Step Act provides a delayed effective date for implementation of the good time credit amendment. This motion asserts that the amendment to § 3624(b) is effective immediately, with the result that Mr. Walker will be incarcerated in violation of the laws and Constitution of the United States as of January 28, 2019. Mr. Walker asks this Court to grant interim relief in the form of conditional release pending this litigation and to ultimately hold that the amendment to the good time credit statute was immediately effective upon signing by the President.

A. The First Step Act Implemented The Bureau Of Prisons' Intent To Use The Term Of Imprisonment As The Proper Measure For Good Time Credit And, Separately, Created A New And Independent "Earned Time Credit" System.

The Sentencing Reform Act of 1984 eliminated the parole system and sharply cut back on the rate at which federal prisoners could earn good time credit, providing in § 3624(b) that prisoners could receive "credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment." The legislative history of the original bill is rife with references to providing a maximum 15 percent reduction for good time credits, which would require 54 days of credit per year of the sentence

imposed. *See, e.g.*, 131 Cong. Rec. S4083-03 (1985) (statement of Sen. Kennedy) (under the Act, the "sentence announced by the sentencing judge will be for almost all cases the sentence actually served by the defendant, with a 15 percent credit for 'good time.'"); 131 Cong. Rec. E37-02 (1985) (statement of Rep. Hamilton) ("Now sentences will be reduced only 15% for good behavior."); *see also* 141 Cong. Rec. S2348-01, S2349 (1995) (statement of Sen. Biden) (as co-author of § 3624(b), on a sentence of ten years, "you are going to go to prison for at least 85 percent of that time . . . . You can get up to 1.5 years in good time credits[.]").

However, the BOP's mathematical formula for counting the 54 days against time actually served, as opposed to the sentence imposed, resulted in prisoners receiving only 47 days of credit for each year of the term of imprisonment. The Ninth Circuit upheld this computation in *Pacheco-Camacho v. Hood*, 272 F.3d 1266, 1268 (9th Cir. 2001), and the Supreme Court approved the 47-day formula using time of actual custody in *Barber v. Thomas*, 560 U.S. 474 (2010). But with the BOP's calculation based on actual time of custody, prisoners have received reductions of only 12.8 percent of the sentence imposed, not the 15 percent Congress contemplated.

Shortly after *Barber*, the Department of Justice and the BOP supported legislation that would shift the 54-day calculation from actual time served to the sentence imposed, thereby increasing the maximum available good time credits from 47 to 54 days per year. *See Hearing on the Oversight of the Federal Bureau of Prisons Before the Subcomm. on Crime, Terrorism, Homeland Security and Investigations of the H. Comm. on the Judiciary*, 113th Cong., at 23-24 (2013) (Statement of Charles E. Samuels, Jr. Director, Federal Bureau of Prisons).[1] By doing so,

[1] Available at https://www.govinfo.gov/content/pkg/CHRG-113hhrg82847/pdf/CHRG-113hhrg82847.pdf, at 23-24.

the statute would conform to the intent of the original legislation to grant a maximum 15 percent reduction. However, the provision was not enacted until recently attached to the First Step Act.

Title I of the First Step Act, entitled "Recidivism Reduction," consists of seven sections spanning 57 pages. The bulk of the title is set out in Section 101 and provides instructions for the Attorney General to create and to implement a "risk and needs assessment system," referred to in the legislation as "the System," along with recidivism reduction programming. App. A at 3-39 (promulgating 18 U.S.C. §§ 3631-3635). The legislation instructs that the System must provide incentives for participation in programming, with the central incentive being the possibility of earning "earned time credit" to be "applied toward time in prerelease custody or supervised release." App. A at 12.

As part of the earned time credit system, Section 102 of the law adds subsection (g) to 18 U.S.C. § 3624. App. A at 44-52. Under that provision, the BOP can place an "eligible prisoner" who has earned time credits equal to the time remaining on his or her sentence in prerelease custody (home confinement or residential reentry center) or transfer the prisoner to supervised release up to 12 months early. *Id.* Section 3624(g)(1) starts with a reference to the eligible prisoners to whom "this subsection" applies. App. A at 44.

Nestled within Section 102(b) of the First Step Act is the two-paragraph "good-time fix" amendment to 18 U.S.C. § 3624(b) that applies to this case and that provides in full:

> Section 3624 of title 18, United States Code, is amended—
>
> (A) in subsection (b)(1)—
>
> (i) by striking '', beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the

> term,'' and inserting ''of up to 54 days for each year of the prisoner's sentence imposed by the court,''; and
>
> (ii) by striking ''credit for the last year or portion of a year of the term of imprisonment shall be prorated and credited with in the last six weeks of the sentence'' and inserting ''credit for the last year of a term of imprisonment shall be credited on the first day of the last year of the term of imprisonment[.]''

App. A at 43-44. The good-time fix appears independent of the other provisions in Title I.

The First Step Act provides timelines for the implementation of the risk and needs assessment system. Specifically, it gives the Attorney General 210 days after enactment of the law within which to develop and publicly release the risk and needs assessment system. App. A at 6 (promulgating 18 U.S.C. § 3632). Within 180 days after that, the Director of the BOP must assess each prisoner and begin to provide appropriate programming. App. A at 39-40 (promulgating 18 U.S.C. § 3621(h)). There is a two-year "phase-in" for the BOP to make programming available to all prisoners. App. A at 40-41. At the end of Section 102(b), the law provides a delayed effective date for "this subsection" contingent on the release of the risk and needs assessment system:

> (2) EFFECTIVE DATE.—The amendments made by this subsection shall take effect beginning on the date that the Attorney General completes and releases the risk and needs assessment system under subchapter D of chapter 229 of title 18, United States Code, as added by section 101(a) of this Act.

At issue here is whether the delayed effective date in Section 102(b)(2) applies only to the earned time transfer provisions in Section 102(b)(1)(B), or whether it also delays the BOP's implementation of the independent good-time fix in Section 102(b)(1)(A).

B. The Good-Time Fix Should Be Construed To Be Effective Immediately Because The Delayed Effective Date Provision Is Rationally Connected Solely To The New Risk And Needs Assessment System.

"[A]bsent *a clear direction by Congress to the contrary*, a law takes effect on the date of enactment." *Gozlon-Peretz v. United States*, 498 U.S. 395, 403 (1991) (emphasis added); *accord*

United States v. Clizer, 464 F.2d 121, 123 n. 2 (9th Cir. 1972); *United States v. Bafia*, 949 F.2d 1465, 1480 (7th Cir. 1991). Here, the only potentially relevant effective date provision in Title I of the First Step Act explicitly links the need for a delay to the risk and needs assessment system. It states: "The amendments made by *this subsection* shall take effect beginning on the date that the Attorney General completes and releases the risk and needs assessment system under subchapter D of chapter 229 of title 18, United States Code, as added by section 101(a) of this Act." App. at 52-53 (emphasis added). Although that provision considered on its own could rationally be read to encompass the good-time fix, the full statutory context as well as potential constitutional infirmities militate in favor of construing "this subsection" narrowly to mean only the newly promulgated subsection (g) of § 3624, which governs the new earned time credit transfer authority, leaving the good-time fix to be effective immediately in the absence of "clear direction by Congress to the contrary."

1. The Statutory Context Of "This Subsection" Favors Application Of The Delayed Effective Date Only To Transfer Based On Earned Time Credits As Opposed To Release Based On Good Time Credits.

"[S]tatutory interpretation turns on 'the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" *Nken v. Holder*, 556 U.S. 418, 426 (2009) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). On its face, the text of the delayed effective date clause provides good reason to construe "this subsection" as referencing solely the new earned time credit transfer provision because of its contingency on the "date that the Attorney General completes and releases the risk and needs assessment system." Only the earned time credit provision has any relation to the risk and needs assessment system. The good-time fix merely adjusts a calculation that the BOP has been making for decades; it

requires no new system to implement and, thus, requires no delay. Moreover, the amendments in Section 102(b)(1)(B) repeatedly use the same phrase "this subsection" to mean subsection (g) of § 3624 that will govern earned-time transfer to prerelease custody. That phrase—"this subsection"—does not appear in the Section 102(b)(1)(A) good-time fix. Thus, context strongly favors the narrow reading of delay applying only to subsection (g).

Traditional tools of statutory construction support this proposed limiting construction of Section 102(b)(2) to solely include § 3624(g) within the delayed effective date. First and foremost, courts "do not construe statutes in a manner that would lead to absurd results," nor do courts "impute to Congress an intent to create a law that produces an unreasonable result." *United States v. Casasola*, 670 F.3d 1023, 1029 (9th Cir. 2012); *see Mellouli v. Lynch*, 135 S. Ct. 1980, 1989 (2015) (rejecting agency construction of statute that "makes scant sense" given the need to avoid "consequences Congress could not have intended") (quoting *Moncrieffe v. Holder*, 569 U.S. 184, 200 (2013)). There is an obvious need to delay implementation of the earned time transfer provision. The entirely new risk and needs assessment system must be in place before the BOP can begin using time credits earned under that system to determine which prisoners should be transferred to prerelease custody or supervised release.

By contrast, the good time credit system is not new, and it operates on a separate plane from the earned time credit transfer and programming provisions of Title I. The BOP has been touting the need for this amendment for many years. The good time credit amendment is a simple calculation, subtracting seven days of good time credit for each year served from compliant prisoners' sentences. The SENTRY computer system of the BOP could implement the adjustment virtually overnight. The time involved for individuals is relatively small and needs no

programming to implement. Unlike larger sentence reductions such as those implemented by retroactive guideline amendments, prisoners impacted by the good-time fix would already be close to release and prepared for reentry. Delaying the good-time fix makes scant sense and undermines rather than furthers coherent implementation of the First Step Act.

Second, courts construe legislation aimed at remedying prior drafting oversights to be immediately effective. In *Gozlon-Peretz*, the Supreme Court considered the effective date of a statutory amendment to correct an apparent mistake in the Controlled Substances Penalties Amendments Act of 1984, which inexplicably mandated post-confinement supervision for many small-time drug offenders but exempted big-time narcotics offenders. 498 U.S. 404-05. The new Act removed that disparity and mandated post-confinement supervision for all Schedule I and II drug offenders. *Id.* The Supreme Court held, "Given the apparent purpose of the legislation to rectify an earlier mistake, it seems unlikely that Congress intended the effective date to be any time other than the date of enactment." *Id.* at 404-05. Similarly, in this case, the purpose of the good-time fix was to rectify the computation based on actual time served that provided seven days per year fewer than intended. As in *Gozlon-Peretz*, it is unlikely Congress intended the rectification of the good time credit calculation to be delayed. Accordingly, the provision should be construed to take effect immediately.

Arguably, a narrow interpretation of "this subsection" in the effective date provision of Section 102(b)(2) to mean subsection (g) of § 3624 would be in contrast with the use of the same term in the applicability provision of Section 102(b)(3), which provides, "The amendments made by this subsection shall apply with respect to offenses committed before, on, or after the date of enactment of this Act, except that such amendments shall not apply with respect to offenses

committed before November 1, 1987." But Section 102(b)(3) includes no reference to the "risks and needs assessment system." Accordingly, that provision can readily encompass both subsections (b) and (g) of § 3624. As the Supreme Court reminded in *Barber*, "the same phrase used in different parts of the same statute [can] mean[] different things, particularly where the phrase is one that speakers can easily use in different ways without risk of confusion." *Barber*, 560 U.S. at 484; *see also ABKCO Music, Inc. v. LaVere*, 217 F.3d 684, 689 (9th Cir. 2000) ("[C]larifying legislation is not subject to any presumption against retroactivity and is applied to all cases pending as of the date of its enactment.").

In the context of the overall legislation and purpose of the statute, the Court should construe "this subsection" to relate only to § 3624(g) in the effective date section, thereby construing the good-time fix to be retroactive and immediately effective to all current inmates.

2. *If Not Construed To Be Immediately Effective, The Delayed Effective Date Of The Good-Time Fix Would Be Arbitrary And Capricious In Violation Of The Due Process And Equal Protection Clauses Of The Constitution.*

Irrational and arbitrary classifications violate the equal protection clause. *Chapman v. United States*, 500 U.S. 453, 465 (1991). The equal protection clause applies to the federal government through the Fifth Amendment's due process clause. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). Delaying the effective date of the good-time fix to an uncertain time in the future would be arbitrary, capricious, and cruel because it would require greater-than-intended incarceration for the class of well-behaved prisoners who, but for the delayed effective date, would be immediately released from incarceration.

"Disparate treatment of similarly situated defendants triggers equal protection concerns when there is no rational basis for the distinction." *United States v. Juvenile Male*, 900 F.3d 1036,

1043 (9th Cir. 2018). Here, the disparate treatment of those whose sentences were calculated before versus after the uncertain future effective date "might well trigger equal protection concerns." *Jonah R. v. Carmona*, 446 F.3d 1000, 1008 (9th Cir. 2006) (construing pretrial credit statute to avoid disparate treatment of juveniles and adults); *Myers v. United States*, 446 F.2d 232, 234 (9th Cir. 1971) (holding that the Fifth Amendment requires that all similarly-situated prisoners receive credit under 18 U.S.C. § 3568); *Stapf v. United States*, 367 F.2d 326, 329 (D.C. Cir. 1966) ("Denial of credit . . . where others guilty of crimes of the same or greater magnitude automatically receive credit, would entail an arbitrary discrimination within the power and hence the duty of the court to avoid.").

As in *Jonah R.*, the Court should construe the good-time fix statute to be effective immediately to avoid serious constitutional problems. 446 F.3d at 1008 ("We must interpret statutes to avoid such constitutional difficulties whenever possible."); *see Clark v. Martinez*, 543 U.S. 371 (2005) (describing the principle of constitutional avoidance); *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (same). Otherwise, the delayed effective date would irrationally and unconstitutionally discriminate against persons who earned the requisite good time credits sufficient for immediate release. Those prisoners presently close to their release dates who have abided by all institutional rules during their incarceration would be held in custody to await the satisfaction of an unrelated condition precedent—the implementation of the risk and needs assessment system. Extending an individual's deprivation of liberty with no countervailing purpose would violate the Due Process Clause and its equal protection component in violation of the Fifth Amendment. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("Freedom from

imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects.").

Although the amount of additional custody is relatively small, "'To a prisoner,' this prospect of additional 'time behind bars is not some theoretical or mathematical concept.'" *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1907 (2018) (quoting *Barber*, 560 U.S. at 504) (Kennedy, J., dissenting). "'[A]ny amount of actual jail time' is significant, and 'ha[s] exceptionally severe consequences for the incarcerated individual [and] for society which bears the direct and indirect costs of incarceration[.]'" *Id.* (quoting *Glover v. United States*, 531 U.S. 198, 203 (2001), and *United States v. Jenkins*, 854 F.3d 181, 192 (2d Cir. 2017)).

C. This Court Should Grant Interim Conditional Release To Prevent Irreparable Harm.

This Court has both constitutional and statutory jurisdiction to review the lawfulness of Mr. Walker's sentence and its execution. *See* 28 U.S.C. §§ 2241 and 2255 (providing statutory habeas corpus jurisdiction to determine the lawfulness of a prisoner's detention); *Boumediene v. Bush*, 553 U.S. 723, 739 (2008) ("The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom."); *see also Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 379-80 (1994) (recognizing ancillary jurisdiction as available to enable the court to manage its proceedings, vindicate its authority, and effectuate its decrees).[2] Concomitant with the Court's

[2] Section 2255 motions must be brought before "the court which imposed the sentence[.]" Although issues related to the execution of the sentence are often brought in the district of confinement under § 2241, the filing in the district of origin is a matter of venue, not subject matter jurisdiction. *Rumsfeld v. Padilla*, 542 U.S. 426, 451 (2004) ("[T]he question of the proper location for a habeas petition is best understood as a question of personal jurisdiction or venue[.]")

habeas jurisdiction is the power to avoid Mr. Walker's unnecessary incarceration by providing conditional release. *See Hensley v. Municipal Court*, 411 U.S. 345, 352 (1973) (habeas authority includes the power to "order [a] petitioner's release pending consideration of his habeas corpus claim") (citing *In re Shuttlesworth*, 369 U.S. 35 (1962)); *Marino v. Vasquez*, 812 F.2d 499, 507 (9th Cir. 1987) (the authority of the court to conditionally release a prisoner pending habeas proceedings derives from the power to issue the writ itself.).

There is no requirement that Mr. Walker exhaust administrative remedies within the BOP before seeking relief from this Court. Exhaustion of administrative remedies is not at issue under § 2255 or the Court's ancillary jurisdiction. And exhaustion is only a prudential consideration, not a jurisdictional requirement, under § 2241. *United States v. Woods*, 888 F.2d 653, 654 (9th Cir. 1989); *Brown v. Rison*, 895 F.2d 533, 535 (9th Cir. 1990). Under the Supreme Court standard in *Madigan v. McCarthy*, exhaustion is excused where 1) the prisoner faces irreparable harm from delay incident to pursuing administrative remedies; 2) there is some doubt whether the agency was empowered to render relief; or 3) the agency has indicated predetermination of the issue, rendering exhaustion futile. 503 U.S. 140, 146-49 (1992).

All three of the considerations in *Madigan* apply here. Without the Court's intervention, Mr. Walker faces imminent irreparable harm in the form of over-service of his sentence given that his correct release date under the new law will pass in a matter of days. As a practical matter, litigation of this question will take more time than is available without causing irreparable harm. Futility is also at issue. The BOP is notifying prisoners in general that the retroactive amendment

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(Kennedy, J., concurring). The implementation of the sentence imposed by this Court, involving purely legal issues, is properly brought in this district.

to the good time credit statute "is not effective immediately." Farah Stockman, *Shutdown Threatens to Delay Criminal Justice Reforms Signed into Law by Trump*, N.Y. Times (Jan. 16, 2019); *see also* Pat Nolan & David Safavian, *When bureaucrats undermine our laws*, The Hill (Jan. 19, 2019) ("rather than put the 54 days into effect immediately despite clear guidance by the First Step Act, the BOP continues to drag its feet."). Accordingly, the Court should not require Mr. Walker to make further efforts to seek an administrative remedy.

Here, Mr. Walker is serving a ten-year term of imprisonment imposed by this Court, and the Court should now act to assure that he serves not a day longer than the law allows. After all, "no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001(a). Mr. Walker has no criminal history and a spotless prison record. The Probation Office has approved his release plan and is aware of this legal action that would potentially accelerate release. The terms of supervised release in the judgment provide appropriate conditions for interim relief pending the litigation.

D. If The Government Controverts Legislative Intent, The Court Should Order Discovery Regarding The Promulgation And Implementation Of The Good Time Credit Amendment And The Meaning Of The Effective Date Provision In Section 102.

If the government disputes the intent of the drafters with respect to the effective date of the good-time fix, Mr. Walker requests that the Court authorize discovery in support of his motion. Specifically, the defendant requests that the government provide petitioner with all writings in the possession of the BOP and the Department of Justice related to the promulgation and implementation of the good time credit amendment from the initial decision to seek such a legislative measure to and including the adoption of the First Step Act's good time credit provision,

including but not limited to memoranda, reports, implementation plans, evaluations, letters, and electronic communications. In addition to the Court's authority by rule and inherent power to require such production, the discovery sought should also be considered required in potential mitigation of sentence under *Brady v. Maryland*, 373 U.S. 83 (1963).

Conclusion

For the foregoing reasons, this Court should enter an order directing the Bureau of Prisons to conditionally release Mr. Walker from custody on the conditions of supervision ordered in the judgment as soon as practicable. Ultimately, the Court should hold that Mr. Walker's good time credits must be calculated pursuant to the amendment to § 3624(b) in the First Step Act without delay.

Respectfully submitted this 25th day of January, 2019.

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